ICC89

Interstate Commerce Commission
1989 Annual Report

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LETTER OF TRANSMITTAL

To the Congress of the United States

Washington, D.C., April 4, 1990

It is my pleasure to submit the 103rd Annual Report of the Interstate Commerce Commission, in accordance with the Interstate Commerce Act. The report generally embraces the fiscal year ended September 30, 1989, except in the discussion of significant actions that transcend the 12-month period, or where necessary to conform to various statistical analyses. The statement of appropriations and aggregate expenditures for fiscal year 1989 appears in Appendix D.

This fiscal year's report marks the end of my tenure as Chairman, a period in which the Commission implemented major deregulatory legislation that made sweeping changes in—and had a significant, positive impact on—the way in which the nation's railroads, motor carriers of property, passenger bus companies, freight forwarders, and water carriers do business today.

Through deregulatory action taken by the ICC according to its Congressional mandate, burdensome regulations have been eliminated or substantially reduced; competition has been greatly enhanced; intermodalism has been encouraged; and the ease of market entry and exit has been vastly improved for all interstate carriers. Such sweeping changes have not only reduced carrier and shipper costs, but also have benefited the ultimate consumers of transportation services here at home and have aided in increasing America's competitive standing abroad in various export markets.

Since I joined the Commission in 1982, the Congress has reduced the Commission's appropriation from approximately $70 million to about $43 million in fiscal year 1989. Today, streamlined and efficient operations enable 700 Commission employees (down from 1,540 in fiscal year 1982) to monitor the last vestiges of interstate transportation regulation.

While I am especially proud of Commission decisions exempting entire classes of rail transportation from regulation where competition is clearly present, in implementing and interpreting some of the more difficult sections of the Staggers Act designed to ensure that all shippers receive the benefits of effective competition for transportation services, and in resisting efforts to reimpose regulation in areas where it is not needed, there is still much that could be done, especially in the area of further motor carrier deregulation. The nation's businesses, shippers, and consumers can only stand to benefit by such action.

Sincerely,

Heather J. Gradison
Chairman

THE COMMISSION

(As of September 30, 1989)

	Appointed	Term Expires Dec. 31
Heather J. Gradison, *Chairman* (R) Ohio[1]	1982	1988
J.J. Simmons III, *Vice Chairman* (D) Oklahoma	1984	1990
Frederic N. Andre (R) Indiana[2]	1982	1987
Paul H. Lamboley (D) Nevada	1984	1989
Karen B. Phillips (R) Virginia	1988	1991

The Commissioners. From the left, Commissioner Paul H. Lamboley, Commissioner Frederic N. Andre, Chairman Heather J. Gradison, Vice Chairman J.J. Simmons III, and Commissioner Karen Borlaug Phillips.

[1] On November 8, 1989, President Bush nominated Edward J. Philbin (R) California as a member and Chairman of the Commission replacing Mrs. Gradison whose term had expired. The Senate confirmed Mr. Philbin on February 9, 1990.
[2] On June 8, 1989, President Bush nominated Edward M. Emmett (R) Texas as member of the Commission replacing Mr. Andre whose term had expired. The Senate confirmed Mr. Emmett on November 17, 1989.

Functions and Responsibility.

The Interstate Commerce Commission is an independent Federal agency responsible for regulating interstate surface transportation within the United States. In carrying out its regulatory responsibilities, the Commission (ICC) attempts to ensure that competitive, efficient, and safe transportation services are provided to meet the needs of shippers, receivers, and consumers.

The ICC today maintains jurisdiction over some 46,997 for-hire companies providing surface transportation in the U.S. Among these companies are railroads, trucking firms, bus lines, barge operations, one coal slurry pipeline, certain types of chemical pipelines, household goods movers, and freight forwarders of household goods.

The Interstate Commerce Commissioners are appointed by the President and confirmed by the Senate. The ICC is authorized to have five Commissioners, each with a five-year term of office.

How the ICC Operates

The Commissioners supervise all of the ICC's activities, and delegate specific authority to the Commission's bureaus and offices.

As the executive head of the Commission, the Chairman coordinates and organizes the agency's work and acts as its representative in legislative matters and in relations with other governmental bodies. In addition, the Chairman generally is responsible for:

1. Overall Commission management and operations;
2. Formulation of plans and policies designed to ensure Commission effectiveness and the able administration of the Interstate Commerce Act;
3. Identification and resolution of major regulatory problems; and,
4. Development and utilization of effective, expert staff support for the fulfillment of the Commission's many duties and functions.

The Vice Chairman represents the Commission and assumes the Chairman's duties during the Chairman's absence or illness. Additionally, the Commission delegates several important functions to the Vice Chairman, including oversight of matters involving the admission, disbarment, or discipline of Interstate Commerce Commission practitioners.

During fiscal year 1989, the Commission's activities were carried out through an organizational structure consisting of the Commission's bureaus and offices, as follows:

- *Office of Government and Public Affairs*—analyzes legislative proposals; assists in the development of the Commission's legislative proposals; aids Congress in drafting legislation; assists in the preparation of testimony to be presented before Congressional committees; assists Members of Congress and other representatives of the 50 states with matters pertaining to the work of the Commission; furnishes information to the general public and the media concerning ICC decisions and activities; conducts briefings for the media and U.S. and foreign visitors; and prepares the ICC's Annual Report to Congress.
- *Office of Human Relations*—manages the Commission's program to provide equal employment opportunity for all employees and applicants, and provides training in the area of human relations.
- *Office of Inspector General*—conducts independent internal audits and investigations of the Commission's operations.
- *Office of the Managing Director*—manages the Commission's day-to-day operations.
- *Office of the Secretary*—serves as the Commission's documentation center and is responsible for the issuance of the Commission's decisions and other legal documents.
- *Office of the General Counsel*—renders legal opinions to the

Commission, and defends Commission decisions challenged in court.

- *Office of Public Assistance (Special Counsel)*—functions as a clearing house for resolution of small-business problems relative to surface transportation regulation; advises the Commission on the nature and status of such problems; contributes to the public interest record in Commission cases; and assists individuals, consumer groups, small communities, small shippers, and transportation and public utility commission officials participating in those cases.
- *Office of Hearings*—staffed by Administrative Law Judges, this office conducts various hearings for the Commission.
- *Office of Transportation Analysis*—conducts economic and statistical analyses of the transportation industry and provides economic advice to the Commission.
- *Office of Proceedings*—processes formal ICC cases pertaining to operating rights, financial matters, mergers, rates, and competitive practices.
- *Office of Compliance and Consumer Assistance*—monitors the activities of railroads, trucking companies, barge lines, freight forwarders, and rate bureaus to ensure compliance with ICC policies, and assists the public in the resolution of complaints against ICC-regulated companies.
- *Bureau of Accounts*—determines and applies uniform accounting and reporting rules; reviews various financial reports; analyzes cost and financial evidence submitted by parties to cases before the Commission; compiles and publishes transportation statistics and cost studies, and conducts audits of pertinent records of transportation firms.
- *Bureau of Traffic*—monitors tariff publication, filling, and interpretation, and suspends any unreasonable or unlawful tariffs before they become effective.

YEAR IN REVIEW

On October 12, 1988, the Commission adopted revised reporting rules for motor carriers of property. The annual reporting form submitted by these carriers was reduced from 60 to 10 pages in size, and their quarterly report form was downsized from nine to three pages. This Commission action reduced the carriers' annual reporting burden by an estimated 64,000 hours.

On October 20, the Commission's multi-year Affirmative Employment Plan for Minorities and Women covering fiscal years 1988-92 was approved by the U.S. Equal Employment Opportunity Commission.

On October 25, the Commission heard oral argument on the request of Trailer Train, Inc. for a 15-year extension of its pooling agreement for the joint purchase, ownership, and operation of railroad cars. On June 14 it granted Trailer Train, Inc. and 19 Class I railroads a five-year extension of their pooling agreement. The Commission denied authority to assign cars or to purchase cars for allocation, however, because it found that those programs would unreasonably restrain competition.

On November 10, the Commission's Office of Compliance and Consumer Assistance (OCCA) issued a report to the Commission on OCCA's review of the Chicago South Shore and South Bend Railroad's (CSS) commuter operations between Chicago, Illinois, and South Bend, Indiana, relative to service, the availability of alternative transportation for commuters, and the possible impact on commuters if CSS discontinued commuter operations. The review and report were prompted by CSS's October 18 petition for permission to discontinue service upon the expiration of its insurance coverage on October 21.

On November 15, the Commission held an open voting conference and established general guidelines for the resolution of issues arising from both Guilford Transportation Industries, Inc.'s use of the ICC's class exemption for intracorporate transactions and a related arbitration decision. On this date, the Commission also submitted to the U.S. Office of Personnel Management its fiscal year 1989 Disabled Veterans Affirmative Action Plan.

On November 17, the Commission adopted new railroad reporting requirements pertaining to the determination of revenue adequacy by adding a new schedule to the rail carriers' annual reporting form. This action implemented the Entity Principle established by the Railroad Accounting Principles Board (RAPB), as well as other changes to improve the data used in the ICC's annual revenue adequacy determination.

The next day, November 18, the Commission issued a notice of policy and final rule governing the submission and evaluation of safety fitness evidence in motor carrier licensing cases. The Commission advised the public that it would reject all applications for operating authority filed by carriers holding "unsatisfactory" U.S. Department of Transportation (DOT) safety ratings and all applications for passenger bus or hazardous materials authority filed by carriers holding "conditional" ratings. The notice provided that all other carriers with less than satisfactory safety ratings may obtain operating authority limited to a one-year term by demonstrating compliance with DOT safety rules.

December 2 saw the Commission revise its rail abandonment regulations by adopting several recommendations of the RAPB. These revisions affected cost of capital rates and projected holding gains or losses accruing from railroad company retention of branch

line assets, and added new "Forecast Year" data to reflect projected operating results on lines proposed for abandonment.

On December 8 and 12, the Commission issued modifications to its rules governing rail abandonments and light-density-line surcharges, respectively. These rule changes were made to provide more accurate data and to implement RAPB findings.

In a decision served to the public on December 20, the Commission determined on court remand the proper form for granting operating authority to household goods contract carriers to provide industrywide service. The Commission defined the class of household goods shippers that have distinct needs and granted the applications of 157 carriers that proposed to provide services designed to meet the distinct needs of members of the class, and/or to dedicate equipment to the exclusive use of commercial shippers.

On January 13, 1989, the Commission authorized the addition of a new "Statement of Cash Flows" financial statement to railroad annual reporting forms to improve the data used to analyze the financial condition of railroads and to conform to a revision to the accounting profession's generally accepted accounting principles.

On January 31, the Commission required the Chevron Pipe Line Company to publish common carrier rates for its phosphate slurry pipeline in Utah and Wyoming.

On February 6, the Commission denied a request for reciprocal switching to allow the Burlington Northern Railroad Company to serve a chemical plant over Atchison, Topeka and Santa Fe Railway Company track. On February 10, the Commission issued a policy statement clarifying its role concerning interim trail use of railroad rights-of-way by stating that claims for reimbursement by adjacent property owners with interests in rights-of-way used for trails should be presented to the U.S. Claims Court under the Tucker Act.

On February 10, the Commission adopted regulations allowing electronic tariff filing as a permissible alternative to the traditional means of filing tariffs in paper form, but required that paper filings continue to accompany electronic filings for a one-year transition period. Additionally, the adopted regulations substituted simple tariff standards for the detailed regulations that formerly guided tariff construction and filing. Subsequently, the regulations were stayed in part, as described below.

In an open voting conference held on February 17, the Commission affirmed an arbitrator's proposal regarding the seniority of employees affected by a series of intracorporate leases implemented by Guilford Transportation Industries, Inc., voted to return to the arbitrator questions related to rates of pay and work rules, and denied petitions to revoke underlying exemptions. On February 23, the Commission heard oral argument regarding proposals to incorporate productivity adjustments in the Commission's railroad cost recovery procedures which allow carriers to adjust rates to account for inflation.

On March 8, the Commission heard oral argument on whether to extend the New York, Susquehanna and Western Railway Corporation's (NYS&W) emergency service authority to operate over the bankrupt Delaware & Hudson Railway Company's tracks, and on March 15 it extended NYS&W's emergency service authority through March 16, 1990.

On March 10, the Commission stayed its February 10 decision adopting regulations allowing electronic tariff filings, pending consideration of requests for further Commission deliberation. This action was taken because there remains some disagreement on the approach and pace of the transition to that technology.

March 10 was also the date on which the Commission reached a final

decision in a coal rate complaint filed under Section 229 of the Staggers Act. That decision found that although the Consolidated Rail Corporation (Conrail) was market dominant, the rates contested in the complaint did not exceed stand-alone costs, in the aggregate. The Commission dismissed the complaint as to single-line rates, and the remaining joint-rate challenge was subsequently discontinued at the complainant's request.

On March 24, the Commission modified its railroad cost recovery procedures to provide for a productivity adjustment. Subsequent Rail Cost Adjustment Factors (RCAFs) governing maximum RCAF-based rate levels will include a productivity adjustment measured by a multi-year lagged average.

On April 17, the Commission determined that it was not required to consider the environmental effects of interim trail use in rail abandonment cases under the National Trail System Act, and that interim trail use did not constitute an unconstitutional taking of rail right-of-way property.

On April 24, Chairman Gradison created an independent Office of Inspector General within the Commission in accordance with the Inspector General Act Amendments of 1988. This office conducts internal audits and investigations—thereby promoting economy and efficiency in Commission operations—and semiannually reports findings to the Chairman, Commissioners, and Congressional oversight committees.

On May 2, the Commission held an open voting conference to consider the National Industrial Transportation League's petition for a declaratory order regarding negotiated motor common carrier rates. The Commission modified its policy concerning cases in which a motor carrier seeks undercharges after having negotiated a rate with a shipper, billed the shipper, and accepted payment at the negotiated rate without having filed the rate in a tariff. The Commission held that it has primary jurisdiction over the involved unreasonable practice issues; its reasonable practice determinations are binding and dispositive of the issue of the maximum reasonable compensation a carrier may receive; its determinations are subject to court review only to determine that they are not arbitrary or capricious; and that it will accept negotiated rates cases without court referrals.

On May 3, the Commission updated its annual estimate of the railroad industry's cost of capital with a finding that the cost of capital was 11.7 percent. On May 5, the Commission heard oral argument regarding Japonica Partners, Inc.'s proposed acquisition of the Chicago and North Western Transportation Company. On May 15 the ICC set terms for the Denver and Rio Grande Western Railroad Company's trackage rights over Union Pacific Railroad Company lines between Pueblo, Colorado, and Kansas City, Missouri.

On June 5, the Commission issued new regulations regarding property tax consequences of rail line abandonments. On June 22, the Commission adopted revised rules implementing the recodified and amended Equal Access to Justice Act, which requires Federal agencies to award attorney fees and other expenses to certain parties that prevail over the Federal Government in certain types of administrative proceedings. The Commission's rules establish uniform procedures for the submission and consideration of applications for an award.

On the last day of June, the Commission again considered challenges to a United Parcel Service, Inc. (UPS) tariff that eliminated the interstate truck transportation of common fireworks. In doing so, the Commission reversed a decision it had made the previous year and found that UPS's tariff provision stating its unwillingness to transport fireworks was not unreasonably discriminatory or otherwise unlawful. The Commission found that UPS's decision to terminate

its participation in fireworks transportation was justified and that alternative transportation services were available to shippers.

On July 12, the Commission issued its recertification standards for states seeking continuing authority to regulate intrastate railroad rates. On July 13, the Commission held an open voting conference to determine its proposed budget for fiscal year 1991. On July 28, the Commission found that certain rail carriers were not market dominant on movements of export coal from the states of Utah and Colorado to California, and therefore dismissed a major coal rate complaint for lack of jurisdiction.

Throughout July, the Commission's Office of Transportation Analysis (OTA) made available its 1988 Waybill Sample, a sampling of all carload waybills for rail traffic terminating in the United States during calendar year 1988. The Commission's waybill sample is the only statistically valid source of data for industrywide rail movements. It was during this month that the OTA also made available its Public Use File containing nonconfidential data on 1988 rail traffic flows and patterns.

On August 3, the Commission interpreted its *New York Dock* labor-protective conditions as applied to certain rail line sales between existing carriers to require both the seller and the purchaser to enter into implementing agreements prior to the consummation of a transaction. On August 14, the Commission issued new accounting and reporting regulations for private carriers that relieved them from the obligation to include private carriage revenues in the carrier revenue classification process.

On August 16, the Commission adopted final rules governing finance applications to purchase, merge, or acquire control of motor passenger or water carriers, as well as requests for temporary authority during the pendency of certain finance applications and petitions for exemption from the ICC's regulations. Taken together, these rules discontinued two application forms, revised another, consolidated and condensed applicable provisions into a straightforward and simplified format, and eliminated obsolete and burdensome filing requirements.

On August 28, the Commission required motor common carriers of household goods to return proportional freight charges on shipments with less than total loss or destruction in transit at the time corresponding loss and damage claims are processed. It was also during this month that the OTA issued a report entitled *A Survey of Shipper Satisfaction with Service and Rates of Shortline and Regional Railroads.* Prepared jointly with the Federal Railroad Administration's Office of Economic Analysis, the report found that most shippers using new shortline and regional railroads experienced rate and service levels that were about the same as or even better than those of the railroads previously serving them.

On September 12, the Commission found that certain restrictions against the use of privately owned, covered rail hopper cars constituted unreasonable practices.

On September 15, the Commission approved refinancing arrangements resulting from the acquisition of the Illinois Central Transportation Company by Rail Acquisition, Inc., a wholly owned subsidiary of the Prospect Group, Inc., and authorized the Illinois Central Railroad Company to use the Commission's securities exemption to refinance the transactions.

In a decision issued on September 18, the Commission approved a requested exemption for the construction of a rail line to serve a Southern Electric Generating Company facility in Alabama. To ensure compliance with the National Environmental Policy Act, the Commission delayed the effective date of this decision until the completion of its environmental review process.

On September 20, the Commission adopted the Uniform Railroad Costing System for all regulatory purposes where general-purpose costs are appropriate. On September 28, the ICC approved Blackstone Capital Partners, L.P.'s control of the Chicago and North Western Transportation Company and authorized use of the securities exemption to finance the transaction. During this last month of fiscal year 1989, the OTA prepared the segment of the U.S. Department of Commerce's publication, *1989 U.S. Industrial Outlook*, dealing with the trucking industry.

Last fiscal year, the Commission's Office of Public Assistance (OPA) responded to more than 18,000 inquiries regarding matters under the ICC's jurisdiction. The OPA also provided advice and assistance to numerous parties involved in rail abandonment cases and other Commission proceedings, participated in one oral hearing and two public hearings pertaining to railroad abandonment cases, and participated in one public hearing pertaining to railroad construction.

The OPA also revised five public informational booklets to reflect changes in Commission rules and procedures, and published a new booklet providing guidelines to potential operators for evaluating the viability of small railroad lines. The Commission's minority and female-owned motor carriers listing was updated by the OPA, and a new listing was published.

The Commission's Office of Inspector General completed five Commission-wide audits and investigations during fiscal year 1989.

OTA continued to maintain a computerized data base of railroad contract summaries by the entry of information concerning nearly 15,000 new contract filings. The OTA utilized this data base to respond to numerous Commission and public requests for information. As of September 30, there were more than 92,000 railroad rate and service contracts filed with the Commission since passage of the Staggers Act.

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LEGISLATION

Hearings and Comments on Legislation

Acquisition of CNW,by Japonica Partners. On May 5, 1989, the Commission commented by letter in response to Senator James J. Exon's request for information concerning the acquisition of the Chicago and North Western Transportation Company (CNW) by Japonica Partners. The Commission provided information regarding Japonica's financial proposal to acquire CNW and the operating plan contemplated by Japonica. The Commission discussed its jurisdiction and specifically addressed the issues of the potential success of the acquisition in terms of the transaction's impact on rail service and competition.

The Commission reported that at that time there was insufficient information available for the ICC to adequately comment on the potential success or failure of the acquisition. The Commission added that the likelihood the post-acquisition process would proceed as projected by Japonica would be difficult to determine and concluded that the extent of the Commission's jurisdiction to evaluate the transaction was unclear by statute.

Leveraged Buyouts in the Rail Industry. On June 22, 1989, the Commission testified before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, Science, and Transportation concerning legislation relating to the sale, purchase, or acquisition of Class I railroads by noncarriers. The proposed legislation was intended to give authority to the ICC in regulating leveraged buyouts and was a result of the potential takeover of CNW by Japonica.

The Commission commented on two bills, S. 1005 and H.R. 2364, both of which would give the ICC jurisdiction over the acquisition of control of a Class I rail carrier by a noncarrier.

The Commission concluded that the Senate bill did not give the ICC meaningful direction to determine which buyouts are acceptable. The House bill was found to list criteria to be considered in approving a leveraged buyout but did not indicate how the Commission was to weigh various factors in making a determination. In its overall summary, the Commission stated that it remains divided as to whether new jurisdiction is advisable.

Intermodal Shipping. In fiscal year 1989, the Commission commented on two separate occasions concerning the regulation of domestic offshore transportation. On February 16, 1989, the Commission advised the House Committee on Merchant Marine and Fisheries on the ICC's views regarding the current status of domestic offshore regulated transportation. The Commission also testified on June 15, 1989, before the same committee on H.R. 2498, the Intermodal Shipping Act of 1989.

As it stands, the Commission regulates coastwise trade and joint rate movements. The H.R. 2498 would establish new regulatory policies and standards governing all movements in the coastwise and domestic offshore trades and would designate the Federal Maritime Commission (FMC) as the agency solely responsible for the regulation of offshore transportation.

The Commission officially took no position on the proposed legislation, but did state that since there are no serious shipper problems at present, it supports the current shared jurisdiction between the ICC and the FMC.

Crosshauling of Food and Refuse. In testimony presented on August 2, 1989, before the Subcommittee on Investigations and Oversight of the House Committee on Public Works and Transportation, the Commission presented the results of its inquiry into the problem of the crosshauling of food and refuse.

The Commission concluded that in order to control the backhauling of trash, two sections of the law could be applied. The first, 49 U.S.C. 10922,

requires applicants for motor carrier authority to be fit, willing, and able to provide transportation. The second is Section 11101 (a) of the Interstate Commerce Act, which provides that motor common carriers shall provide safe and adequate service, equipment, and facilities. The Commission commented, however, that the application of these statutes would not solve the problem because they could only be applied to regulated carriers, and carriers not regulated by the ICC would remain unchecked.

Reports to Congress

As required by law, the Commission must report to Congress by December 31 of every year that the requirements of the Federal Managers' Financial Integrity Act of 1982 have been met, or explain why total compliance has not been fully achieved.

On December 7, 1988, the Commission stated in a letter to Congress that the ICC's internal control and financial systems, taken as a whole, provide reasonable assurances that the Commission has reached the objectives of the Act.

Inspector General Act Amendments

On October 18, 1988, President Ronald Reagan signed into law S. 908, the "Inspector General Act of 1988".[1] This legislation added inspector general offices to many federal departments and agencies, including the Commission. In April 1989, the Commission created an independent Office of the Inspector General (OIG), which reports directly to the Chairman and to Congressional oversight committees, and forwarded two statutorily required, semiannual OIG reports to those committees.

ICC Sunset Proposal

On May 3, 1989, H.R. 2211 was introduced. Entitled "The Interstate Commerce Commission Sunset Act of 1989", this bill was referred to the House Committees on Public Works and Transportation and Energy and Commerce. No hearings were held on the proposal.

[1] P.L. 100-504.

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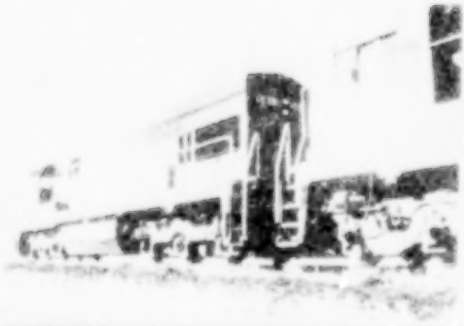

ADMINISTRATION

Organization and Management

In fiscal year 1989, there were no major changes in the Commission's organizational structure or management as the Commission continued to make the most efficient use of its resources in light of its changing regulatory role. To implement the Inspector General Act Amendments of 1988[1], the Commission established and staffed the Office of the Inspector General. The Commission's average staff-year employment level stood at 699 for the past fiscal year, a decrease of 13 from the prior fiscal year's average of 712.

Human Relations

The office of Human Relations continued to direct its efforts to the fulfillment of its public-service mandate in the areas of equal employment opportunity (EEO) and human resources management during the fiscal year.

In the area of EEO, the office continued to monitor Commission recruitment, hiring, placement, and career development programs to ensure compliance with Federal objectives for a truly representative work force. Training for headquarters and field office managers, supervisors, and staff was a major focus of the office's activities, and the Commission's Upward Mobility Training Program was expanded.

The office continues to serve as a focal point for agency activity in encouraging cultural understanding, improving employee morale, and in settling differences that can affect productivity.

Commission Budget

The Commission's fiscal year 1991 budget was developed and submitted concurrently to the Office of Management and Budget and the Congress in August 1989. The budget reflected a status quo staffing level to provide continuity of regulatory functions in the absence of the passage of legislation further deregulating the motor carrier industry, and the Commission's streamlined administrative procedures in motor freight, household goods, and railroad matters have further promoted efficient resource use.

Fiscal Year 1989 Appropriations

Commission funding for fiscal year 1989 was included in the Department of Transportation and Related Agencies Appropriations Act, 1989[2], approved September 30, 1988, which authorized the following appropriations:

- *Salaries and Expenses:* For necessary expenses of the Commission, including services as authorized by 5 U.S.C. 3109, and not to exceed $1,500 for official reception and representation expenses, $43,115,000, provided that joint board members and cooperating state commissioners may use government transportation requests when traveling in connection with their official duties as such.
- *Directed Rail Service:* No funds provided in the Appropriations Act were to be available for the execution of programs the obligation for which could reasonably be expected to exceed $475,000 for directed rail service authorized under 49 U.S.C. 11125 or any other legislation.

Salaries and Expenses Appropriations

On February 28, 1989, Chairman Heather J. Gradison and staff appeared before the Subcommittee on Transportation of the House Committee on Appropriations to testify on the Commission's fiscal year 1990 budget request. The Chairman and staff supported the request to the Subcommittee on Transportation of the Senate Committee on Appropriations by responding on May 26, 1989, to a series of written questions in lieu of a hearing.

[1] P.L. 100-504.

[2] P.L. 100-457.

Payments for Directed Rail Service Appropriation

The last instance of subsidized directed rail service occurred between October 5, 1979, and March 23, 1980, when the Kansas City Terminal Railway Company provided service over the lines of the Chicago, Rock Island, and Pacific Railway Company. The Congress last appropriated funds for this directed service in a fiscal year 1982 supplemental appropriation.

Since no new, subsidized directed rail service is anticipated, no funds were requested for fiscal year 1990.

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RAILROADS

General Financial Condition

Earnings of the railroad industry's Class I line-haul carriers declined during fiscal year 1989. A comparison of operating results for fiscal year 1989 with fiscal year 1988 reveals that net railway operating income declined 6.5 percent to $2.4 billion and ordinary income decreased 7.4 percent to $2.6 billion. Operating revenues and revenue ton miles rose during fiscal year 1989 by 1.4 percent and 1.5 percent, respectively.

Earnings during the first nine months of 1989 declined substantially compared to the same period of 1988 and more than offset the increase in earnings reported for the fourth quarter of 1988 compared to the same quarter of 1987. These earnings data exclude large accounting adjustments, or "special charges", used by seven railroads to record major restructuring efforts, to eliminate excess capacity, and to increase labor productivity. Such special charges include adjustments to record severance pay for employee buyouts, the write-down of assets attributable to freight car retirements and line abandonments, and costs and claims expected to result from litigation and negotiated settlements.

The decline in earnings by Class I railroads during fiscal year 1989 is attributed primarily to intense intermodal and intramodal competition which prevented railroads from increasing rates sufficiently to offset rising costs.

Class I line-haul railroad employment declined 3.5 percent to a monthly average of 230,150 employees during fiscal year 1989, compared to a monthly average of 238,426 employees during fiscal year 1988. Railroad industry employment levels declined about 50 percent between passage of the Staggers Rail Act of 1980 and fiscal year 1989.

Reorganizations

The only active railroad reorganization still pending before the Commission last fiscal year under former Section 77 of the Bankruptcy Act[1] involved the Morristown and Erie Railroad Company, and three compensation petitions were filed for Commission approval.[2] Bankruptcy courts may ask the Commission for advice in connection with railroad reorganizations under Subchapter IV of the Bankruptcy Code.[3] At the request of the bankruptcy court handling the reorganization of the Chicago, Missouri and Western Railway Company (CMW), the Commission, in an extraordinary, 32-day schedule, approved with some modifications the application of SPCSL, Inc., to acquire CMW's line between East St. Louis, and Chicago, Illinois.[4]

On April 7, 1989, the Chicago South Shore and South Bend Railroad (CSSSB) filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code. The CSSSB filed an emergency petition for exemption to suspend its interstate rail passenger operations between South Bend, Indiana, and Chicago, Illinois, which the Commission treated as a service discontinuance request under 49 U.S.C. 10908.[5] The Commission instituted an investigation, and found that the financial losses to CSSSB from its unresolved subsidy problems with local commuter authorities warranted discontinuation of its passenger service.[6] The Commission encouraged the involved parties to negotiate an alternative to the cessation of service, and they did so.[7]

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[1] 11 U.S.C. 206.

[2] Finance Docket No. 28691 (Sub-No. 5), *et al., Morristown & Erie R.R. Co. (Reorganization).*

[3] 11 U.S.C. 1161-1174.

[4] *Rio Grande Industries, et al.—Pur & Track—CMW Ry. Co.*, 5 I.C.C.2d 952 (1989), also discussed under *Intercarrier Transactions, infra.*

[5] Finance Docket No. 31348, *Chicago South Shore and South Bend Railroad Discontinuance of Passenger Trains Under 49 U.S.C. 10908* (not printed), served October 31, 1989.

[6] *Id.*, served November 23, 1988.

[7] Also discussed under *Passenger Service, infra.*

On June 20, 1988, the Delaware and Hudson Railway Company (D&H) filed a petition for reorganization under Chapter 11 of the Bankruptcy Code in the U.S. District Court for the District of Delaware and, on June 23, D&H informed the Commission that it would cease providing service. The Commission then authorized directed service, under 49 U.S.C. 11125, over D&H tracks. Subsequently, in February 1989, the Commission found that D&H's cessation of service without authority created a transportation emergency under 49 U.S.C 11123, requiring the continuation of service by another carrier. The Commission authorized the New York, Susquehanna and Western Railway Corporation (NYS&W) to operate without federal subsidy over D&H's track, and trackage rights for 30 days.[8] The Commission later extended NYS&W's emergency service authority through March 16, 1990.[9]

Securities

The issuance of securities (including equipment trust certificates) and the assumption of liabilities are exempt under the Commission's class exemption for Class II and III carriers.[10] For Class I carriers, a special procedure exists that specifically provides for protests and ICC investigation. Five notices of exemption for Class I securities were filed in fiscal year 1989.[11] Notices filed by the Illinois Central Railroad Company (UCR) were protested, as was the notice filed by the Chicago and North Western Transportation Company (CNWT) in connection with the acquisition of CNWT by Blackstone Properties, Inc. Both were investigated. The CNWT investigation was pending at the end of the fiscal year.[12]

The ICR transactions involved refinancing arrangements resulting from the acquisition of ICR's corporate parent, the Illinois Central Transportation Company (ICTC), by Rail Acquisition, Inc. (Rail), a wholly owned subsidiary of the Prospect Group, Inc. (Prospect). Under the proposal, Prospect had sought control of ICR directly, with the result that ICTC and Rail would cease to exist. To acquire the outstanding shares of ICTC and Rail, ICR proposed to finance $495 million through various refinancing transactions, including the issuance of securities and the assumption of obligations. The Commission stayed the effectiveness of the notice of exemption and instituted an investigation of the proposal.[13] Substantial background information was filed and, after its review, the Commission permitted the transactions to go forward, subject to reporting requirements.[14]

Finally, a petition for exemption to allow a carrier to issue chattel mortgages and promissory notes was dismissed during the fiscal year for lack of jurisdiction.[15]

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[8] *See* Service Order No. 1506, *The New York, Susquehanna and Western Railway Corporation Authorized to Operate Tracks of Delaware and Hudson Railway Company, Debtor (Francis P. Dicello, Trustee)* (not printed), served February 13, 1989.

[9] Service Order No. 1506, In Supplemental Order No. I, *The New York, Susquehanna and Western Railway Corporation Authorized to Operate Tracks of Delaware and Hudson Railway Company, Debtor (Francis P. Dicello, Trustee)* (not printed), served March 15, 1989.

[10] 49 CFR Part 1175.

[11] *See, e.g.*, Finance Docket No. 30980 (Sub-No. 2), *Chicago & North Western Transportation Company--Notice of Exemption--Issuance of Securities*, filed October 27, 1988.

[12] Finance Docket No. 31493 (Sub-No. 1), *Notice of Exemption Issuance of Securities and Assumption of Obligations and Liabilities--Chicago and North Western Transportation Company and Midwestern Railroad Properties, Incurporated*, filed June 21, 1989.

[13] Finance Docket No. 31468, *Notice of Exemption--Issuance of Securities and Assumption of Liabilities Illinois Central Railroad Company* (not printed), served May 24, 1989.

[14] Finance Docket No. 31468, *Notice of Exemption--Issuance of Securities and Assumption of Liabilities Illinois Central Railroad Company* (not printed), served September 18, 1989.

[15] Finance Docket No. 31395, *Kansas City Southern--Petition for Exemption*, and Finance Docket No. 31396, *Kansas City Southern--Petition for Declaratory Order* (not printed), served January 4, 1989.

Intercarrier Transactions

For the first time in several years, no major mergers or consolidations among rail carriers were proposed or were pending approval before the Commission in fiscal year 1989. However, the sale of line segments between carriers increased significantly. Intercarrier acquisitions are governed by 49 U.S.C. 11343. Two applications for significant intercarrier line sales and acquisitions were considered by the Commission last year, and the Commission also approved three "minor" applications [16] to acquire CSX Transportation, Inc. (CSXT) lines.[17] Additionally, several petitions for exemption from formal review of intercarrier line acquisitions were also considered.

Pursuant to a U.S. Bankruptcy Court order, SPCSL Corp., a subsidiary of Rio Grande Industries, Inc. filed an application to acquire approximately 250 miles of the Chicago, Missouri & Western Railway Company's (CMW) main line between St. Louis and Chicago, as well as 33 miles of branch lines and 13 miles of industrial lead tracks.[18] The Commission approved the transaction and the construction of a 0.6-mile track to connect with a Union Pacific Railroad Company (UP) line at Valley Junction, Illinois. Certain related trackage rights applications were also approved, while others were not.

Rio Grande Industries, Inc., and several of its subsidiaries, filed a notice of intent to acquire the Soo Line Railroad Company's Kansas City, Missouri, to Chicago main line and connecting branch lines. A number of related applications were also filed, and Chairman Gradison granted a protective order to facilitate the exchange of confidential information.[19] The Commission found the proposal to be a significant transaction, gave notice of the filing, sought comments on the applicants' proposed schedule, and granted various waivers of its consolidation rules.[20]

Many intercarrier line sales were approved by exemption from formal review under 49 U.S.C. 11343. These transactions often involve acquisitions by Class III carriers that can offer a lower cost structure and local management. This allows marginal lines to be operated profitably and shippers to receive better service.[21] However, sales and acquisitions between and among Class I carriers may also be authorized by exemptions, as in the Consolidated Rail Corporation's (Conrail) maintenance-related acquisition of the Canadian National Railway Company's (CN) 114-mile Massena Line in New York State, which was subject to CN trackage rights.[22]

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[16] *See* 49 CFR 1180.2 for definitions of "major", "minor", "significant", and "exempt" transactions.

[17] Finance Docket No. 31316, *The Huron and Eastern Railway Company, Inc.—Acquisition—CSX Transportation, Inc. Line Between Bad Axe and Saginaw, MI* (not printed), served December 19, 1988, to purchase 58.47 miles of track; Finance Docket No. 31329, *Tennessee Southern Railroad Company, Inc.—Purchase and Lease—CSX Transportation, Inc.* (not printed), decision served January 26, 1989, to purchase 43.6 miles of track and to lease another 74.26 miles; and Finance Docket No. 31368 (Sub-No. 1), *R.J. Corman Railroad Co./Memphis Line—Purchase and Lease—CSX Transportation, Inc. Line Between Warwick and Uhrichsville, OH* (not printed), served June 23, 1989, to purchase 33.8 miles of track and lease another 15.1 miles.

[18] *Rio Grande Industries, Inc. Et Al.—Purchase and Trackage Rights—CMW Ry Co.*, 5 I.C.C.2d 952 (1989).

[19] Finance Docket No. 31505, *Rio Grande Industries, Inc., Et Al.—Purchase and Related Trackage Rights—Soo Line Railroad Company Line between Kansas City, MO and Chicago, IL* (not printed), served July 21, 1989.

[20] *Id.* decisions (not printed), served August 4, 1989 and August 16, 1989.

[21] *See e.g.*, Finance Docket No. 31344, *900 Partners' Investments—Control Exemption—Amfac, Inc.* (not printed), served November 16, 1988; Finance Docket No. 31407, *Sidney & Lowe Railroad, Inc. and Union Pacific Railroad Co.—Exemption From 49 U.S.C 11343* (not printed), served May 5, 1989; and Finance Docket No. 31444, *Austin & Northwestern Railroad Co., Inc.—Acquisition and Operation Exemption—Missouri Pacific Railroad Co.* (not printed), served May 22, 1989.

[22] Finance Docket No. 31477, *Consolidated Rail Corporation—Acquisition Exemption—Canadian National Railway Company* (not printed), served September 5, 1989.

CN also filed an application for trackage rights over a portion of the Guilford Transportation Industries, Inc. (Guilford) system. This application followed court remands [23] of a Commission decision not to impose interchange protective conditions for CN in recent Guilford control proceedings.[24] The Commission denied CN's requested trackage rights, but imposed a condition preserving Guilford's handling of traffic at a minimum level as determined by the level handled on January 6, 1989.[25] CN's approval is required for service reductions, and service reductions are only allowed after 30-day notice to CN. CN may petition the Commission to prevent reductions by showing that changes will disrupt Midwest service.

The Denver and Rio Grande Western Railroad Company (DRGW), and the Union Pacific rail system reached an agreement establishing the annual rental compensation for DRGW's trackage rights operations between Pueblo, Colorado, and Kansas City, Missouri. The Commission required these trackage rights to remedy certain anticompetitive effects resulting from the merger and consolidation of the UP, the Missouri Pacific Railroad Company, the Missouri Pacific Railroad Corporation, and the Western Pacific Railroad Company.[26] The parties agreed to a formula partially based on agreed line valuations, an earnings multiple of 5.0, and a rate of return based on the latest pretax rail cost of capital. All other aspects of DRGW's trackage rights compensation agreement with UP are determined by terms set by the Commission.[27] The Commission approved the agreement and dismissed the proceeding.[28]

Consistent with the Commission's policy disfavoring traffic-protective conditions that restrain competition in the rail industry,[29] the Commission granted Conrail's petition to remove 17 specified conditions imposed when the New York Central Railroad Company acquired control of both the Chicago Junction Railway and the Chicago River and Indiana Railroad Company in 1922.[30] The conditions were designed to ensure the acquiring carriers' neutrality in providing terminal services for other line-haul carriers and to continue line-haul operations for livestock trains over the Chicago Junction Lines. The Commission noted that much of the traffic that the conditions were designed to protect is now deregulated intermodal traffic. Furthermore, intervening mergers and acquisitions have significantly changed the character of the operations of the carriers that benefited from these conditions.

The Commission granted the Winona Bridge Railway Company (WB), a subsidiary of the Burlington Northern Railroad Company (BN), leave to withdraw its notice of exemption to establish trackage rights, discontinued the

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[23] *Lamoille Valley R.R. v. ICC*, 711 F.2d 295 (D.C. Cir. 1983), and *Central Vermont Ry. v. ICC*, 711 F.2d 331 (D.C. Cir. 1983).

[24] *Guilford Transportation Indus. – Control – Boston & M. Corp.*, 366 I.C.C. 292 (1982); and *Guilford Transp. Indus. – Control. – Delaware & H. Ry.*, 366 I.C.C. 396 (1982).

[25] *Guilford Transportation Industries, Inc. – Control – Boston and Maine Corporation*, 5 I.C.C.2d 202 (1989).

[26] *Union Pacific Corp., Et Al. – Control – MO-KS-TX R. Co. Et Al.*, 4 I.C.C.2d 409 (1988).

[27] *St. Louis Southwestern Ry. Co. – Trackage Rights Compensation*, 1 I.C.C.2d 776 (1984) and *St. Louis Southwestern Ry. Co. – Trackage Rights Compensation*, 4 I.C.C.2d 668 (1987).

[28] Finance Docket No. 30000 (Sub-No. 18), *Denver and Rio Grande Railroad Co. – Trackage Rights – Missouri Pacific Railroad Company – Between Pueblo, CO and Kansas City, MO* (not printed), served October 25, 1988.

[29] *Traffic Protective Conditions*, 366 I.C.C. 112 (1982), *reversed in part* (to require consideration of revocations on a case-by-case basis) in *Detroit, Toledo & Ironton R. Co. v. ICC*, 725 F.2d 47 (6th Cir. 1984).

[30] Finance Docket No. 1165 (Sub-No. 1), *Chicago Junction Case, Application of New York Central Railroad Co. for Approval of Purchase of Stock, Lease of Property, and Option to Purchase Stock or Property* (not printed), served August 18, 1989.

proceeding, and vacated all prior decisions in the case.[31] BN had negotiated trackage rights with WB to conduct bridge movements from Seattle, Washington, to Winona Junction, Wisconsin, a distance of 1,860 miles. A U.S. District Court enjoined BN from initiating operations with WB until it exhausted the mandatory collective-bargaining provisions of the Railway Labor Act.[32] No operations were conducted under the proposal.

Under 49 U.S.C. 11342, the Commission may authorize railroad pooling agreements that include joint purchasing and ownership of railcars. The Commission granted Trailer Train Company and 19 Class I railroads a five-year extension of an existing pooling agreement of this nature,[33] subject to exceptions and conditions.[34] The Commission found that the pooling plan would permit the continuation of improved intermodal flatcar use through flexibility in the movement of pool cars and more efficient use of cars nationwide. However, Trailer Train's authority to assign cars or purchase cars for allocation was denied. The Commission found that Trailer Train had failed to demonstrate that this part of the program would not unreasonably restrain competition. The Commission also approved a proposed stock ownership redistribution plan.

During the fiscal year, the Commission adopted final rules exempting from regulation as a class most instances of interlocking directorates.[35] Under this class exemption, a person holding the position of officer or director of one carrier may assume the position of officer or director of another carrier without prior Commission approval, except where both carriers are Class I railroads. A challenge to the class exemption is pending in court.[36]

The Commission's class exemption procedures expedited the handling and consideration of numerous other financial transactions in fiscal year 1989. These exemptions include 11 acquisitions or continuances in control of a nonconnecting carrier;[37] 19 intercorporate transactions that do not significantly affect operations, service levels, or changes in competitive balance with carriers outside a corporate family;[38] one lease renewal exemption;[39] six line relocations;[40] and 38 acquisitions and renewals of trackage rights not related to rail consolidation proceedings.[41]

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[31] Finance Docket No. 31163, *Winona Bridge Railway Company – Trackage Rights – Burlington Northern Railroad Company* (not printed), served March 31, 1989.

[32] *Burlington Northern R.R. Co.* v. *United Transportation Union*, No. 88-C-2687, (N.D. Ill., June 13, 1988).

[33] Approved in *American Rail Box Car – Pooling*, 347 I.C.C. 862 (1974).

[34] *Trailer Train Company, Et Al. – Pooling – Car Service*, 5 I.C.C. 2d 552 (1989).

[35] *Exemption – Certain Interlocking Directorates*, 5 I.C.C. 2d 7 (1988).

[36] *Patrick W. Simmons* v. *Interstate Commerce Commission and United States of America*, No. 88-1773 (D.C. Cir. filed Oct. 28, 1988).

[37] *See* 49 CFR 1180.2(d)(2); *See, e.g.*, Finance Docket No. 31122, *Chicago West Pullman Corp. – Continuance in Control Exemption – P&LE Railco, Inc. and – Control Exemption – The Pittsburgh Chartiers and Youghiogheny Railway Co.* (not printed), served August 8, 1989.

[38] *See* 49 CFR 1180.2(d)(3); *See, e.g.*, Finance Docket No. 31318, *Norfolk and Western Railway Co. and The Wheeling and Lake Erie Railway Co. – Merger Exemption* (not printed), served October 6, 1988.

[39] *See* 49 CFR 1180.2(d)(4); Finance Docket No. 30142 (Sub-No.4), *Southern Railway Company and Virginia and Southwestern Railway Company – Renewal of Lease Exemption* (not printed), served March 17, 1989.

[40] *See* 49 CFR 1180.2(d)(5); *See, e.g.*, Finance Docket No. 31342, *Soo Line Railroad Company and Burlington Northern Railroad Company – Exemptions – Joint Project for Relocation of a Line of Railroad and Trackage Rights* (not printed), served October 24, 1988.

[41] *See* 49 CFR 1180.2(d)(7); Finance Docket No. 31307, *The Atchison, Topeka and Santa Fe Railway Co. – Trackage Rights – Oklahoma, Kansas and Texas Railroad Co.* (not printed), served October 12, 1988.

Acquisitions by Noncarriers

The use of the Commission's class exemption[42] from 49 U.S.C. 10901 for the acquisition of rail lines by noncarriers continued to decline in comparison with fiscal year 1988. Only 40 notices of exemption were filed in fiscal year 1989, compared with 52 notices in fiscal year 1988, and the 40 notices involved far fewer miles than those filed in the previous year. Two proceedings were discontinued at the parties' request, and their notices of exemption were withdrawn,[43] and the Commission rejected one notice.[44] The 42 exemptions authorized by the Commission (40 this past year plus two pending from fiscal year 1988) involved only 1,538 miles, compared to 58 authorized transactions, involving 5,581 miles, during fiscal year 1988. The decline in use of the exemption procedures continued to reflect industry and noncarrier uncertainty regarding labor issues.[45] Since the class exemption[46] became effective on February 17, 1986, 190 transactions have been processed by the Commission.

Under the Commission's class exemption for the acquisition of rail lines by noncarriers, an exemption automatically becomes effective seven days after the filing of a notice with the Commission if the new entity will be a Class III rail carrier. For transactions resulting in the creation of a Class III carrier, there is a 14-day notice-of-intent period followed by a 21-day notice period. A petition to revoke an exemption under 49 U.S.C. 10505(*d*) may be filed by a party opposing an acquisition. While the filing of a petition seeking revocation of the exemption will not automatically stay the effectiveness of an exemption, the Commission will revoke an exemption, in whole or in part, whenever the rail transportation policy of section 10101a of the Interstate Commerce Act so requires. Thus, unopposed acquisitions made under the class exemption are processed with a minimum of regulatory delay, while opposed exemptions may be examined in detail.

In two significant proceedings, the Commission affirmed use of its exemption procedures.[47] The Commission also denied a revocation request alleging that insufficient information was provided in a class exemption proceeding involving the Buffalo and Pittsburgh Railroad, Inc. (B&P).[48] The Commission found that the notice filed with it in this instance contained clear and complete information, and that involved parties

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[42] 49 CFR 1150, Subpart D.

[43] Finance Docket No. 31425, *Bi-State Development Agency of the Missouri-Illinois Metropolitan Dist.—Acq. and Oper. Exemp.—Norfolk & West. Ry. Co. and Wabash R. Co.* (not printed), served March 31, 1989, subsequently refiled and granted in Finance Docket No. 31425 (Sub-No. 1), *Bi-State Development Agency of the Missouri-Illinois Metropolitan Dist.—Acq. and Oper. Exemp.—Norfolk & West. Ry. Co. and Wabash R. Co.* (not printed), served July 6, 1989; and Finance Docket No. 31426, *Railroad Switching Service of Missouri, Inc.—Acq. and Oper. Exemp.—Norfolk & West. Ry. Co.* (not printed), served March 31, 1989, subsequently, refiled and granted as a lease transaction in Finance Docket No. 31426 (Sub-No. 1), *Railroad Switching Service of Missouri, Inc.—Lease and Oper. Exemp.—Norfolk & West. Ry. Co.* (not printed), served June 23, 1989.

[44] Finance Docket No. 31510, *Ecclas & Eastern Railroad Company Incorporated—Exemption* (not printed), served September 18, 1989.

[45] *See* "Rail Labor Issues."

[46] *See Class Exemption for Acquisition and Operation of Rail Lines under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1986).

[47] *See, e.g.*, Finance Docket No. 31187, *Southeastern Rail Corporation—Acquisition and Operation Exemption—Gulf and Mississippi Railroad Corporation* (not printed), served August 31, 1989, and Finance Docket No. 31205, *FRVR Corporation—Acquisition and Operation Exemption—Chicago and North Western Transportation Company* (not printed), served February 28, 1989.

[48] Finance Docket No. 31116, *Buffalo & Pittsburgh Railroad, Inc.—Exemption—Acquisition and Operation of Lines in New York and Pennsylvania*, and Finance Docket No. 31117, *Genesee & Wyoming Industries, Inc., The Arthur T. Walker Estate Corporation and Dumaines and Buffalo & Pittsburgh Railroad, Inc.—Exemption Control* (not printed), served July 10, 1989.

had the opportunity to obtain additional information during the discovery period. The petitioner in this case also had argued that the line acquisition by B&P should be considered a transaction under 49 U.S.C. 11343, which governs the sale of lines to existing railroads, rather than as an acquisition by a non-carrier under 49 U.S.C. 10901.

In this proceeding, the record showed that one of the two B&P shareholders owned other rail carriers, the B&P line connected with lines of those carriers, and B&P might hire some employees from these carriers. The Commission found that such ties were insufficient to make the transaction subject to Section 11343 because the purchaser was a newly formed corporation, which would own and operate the line, publish tariffs, offer service, enter into contractual obligations, acquire equipment and materials, and hire employees in its own name and for its own account. The Commission also noted that actions by stockholders assisting a purchaser in obtaining a loan do not affect a purchaser's financial independence.

In another proceeding, the Commission noted that use of the class exemption for a transaction is obtained by the proper filing of a notice of exemption and does not require prior Commission approval.[49] As a consequence, when parties decide not to proceed with a transaction, the Commission does not issue a decision to vacate.[50]

The Commission also concluded its investigation of the Burlington Northern Railroad Company's sale of its 893-mile "South Line" in Idaho and Montana to Montana Rail Link under the class exemption. The Commission found that the Montana Public Service Commission (MPSC) had not presented grounds for revocation because MPSC had not shown material error in the Commission decision affirming the exemption,[51] and because MPSC's proffered evidence did not constitute new evidence.[52]

At Congress' behest, the Commission instituted a proceeding to examine the attempt by Japonica Partners to acquire the CNW Corporation, the parent company of the Chicago and North Western Transportation Company.[53] The Commission reviewed whether the proposed leveraged buyout would require refinancing that might threaten the financial health of the carrier. Japonica provided substantial financial and operational information and presented testimony at an oral hearing before the Commission. The Commission's findings were contained in a letter to Senator James J. Exon dated May 15, 1989.

[49] Finance Docket No. 31121, *P&LE Railco, Inc.—Exemption, Acquisition and Operation—Lines of the Pittsburgh and Lake Erie Railroad Company and The Youngstown and Southern Railway Company;* Finance Docket No. 31122, *Chicago West Pullman Corporation—Continuance in Control Exemption—P&LE Railco, Inc. and—Control Exemption The Pittsburgh, Chartiers and Youghiogheny Railway Company;* and Finance Docket No. 31126, *Railway Labor Executives' Association* v. *Pittsburgh and Lake Erie Railroad Company, et al.* (not printed), served August 8, 1989.

[50] The Commission was also notified that two notices, involving 309 miles of rail line, were not consummated. Finance Docket No. 31346, *Rail Holdings, Inc.—Acq. and Oper. Exemp.—Paducah & Louisville Ry., Inc.* and Finance Docket No. 31346 (Sub. No. 1), *Paducah & Louisville Ry. Partnership—Acq. and Oper. Exemp.—Rail Holdings, Inc.* (not printed), served November 25, 1988.

[51] Finance Docket No. 31089, *Montana Rail Link, Inc.—Exemption Acquisition and Operation—Certain Lines of Burlington Northern Railroad Company* (not printed), served May 26, 1988.

[52] Finance Docket No. 31089, *Montana Rail Link, Inc.—Exemption Acquisition and Operation—Certain Lines of Burlington Northern Railroad Company* (not printed), served December 14, 1988.

[53] Ex Parte No. 480, *Chicago and North Western Transportation Company—Transportation Ramifications of Acquisition by Japonica Partners.*

Subsequently, the CNW Corporation was sold to Blackstone Capital Partners, L.P.[54]

Feeder Line Sales

Several issues relating to acquisitions under the Commission's Feeder Railroad Development Program [55] were resolved this fiscal year. This program is designed to preserve feeder lines prior to their downgrading or abandonment. A line purchaser must pay the constitutional minimum price for the line and guarantee adequate service for at least three years. Lines subject to this program are those identified by carriers on their system diagram map as proposed for abandonment and lines on which existing service is inadequate. In one proceeding,[56] the Commission clarified that an entire line need not be in a single abandonment category to qualify as a feeder line under the Commission's regulations.[57]

In a significant feeder line case,[58] the Commission considered the competing applications of the Cheney Railroad Company (Cheney) and Tyson Foods, Inc. (Tyson), to purchase 54.76 miles of line of CSX Transportation, Inc. (CSX). It found both Cheney and Tyson to be financially responsible and able to provide adequate service. CSX was directed to negotiate the sale of the short segment of the line that was the subject of the competing application with either applicant. The Commission also directed CSX to negotiate with Cheney for the sale of the remainder and agreed to set joint rates if necessary. The Commission established the purchase price at the net liquidation value, using the criteria applicable to offers of financial assistance under 49 U.S.C. 10905, but allowed the parties to modify the terms of sale by mutual agreement. Subsequently, the consummation date was extended to permit the parties to comply with the 90-day notice period for negotiation of an implementing agreement mandated by the *New York Dock* [59] labor protective conditions.[60] The parties resolved several issues, including the allocation of closing costs, without Commission assistance.

Related to this feeder line acquisition, the Commission dismissed as unnecessary Tyson's petition to have its wholly owned subsidiary, Tyson Railroad, Inc. (TRR), exempted from the requirements of 49 U.S.C. Subtitle IV.[61] The Commission noted that Tyson had elected, under 49 U.S.C. 10910(g)(1), to be exempt from the Subtitle IV requirements (except for the joint rate provisions of Chapter 107) when it acquired its feeder line. Since TRR was created to operate the line for Tyson, the Commission found that TRR is simply standing in the shoes of Tyson and is entitled to the exemption obtained by Tyson without further Commission approval.

With the rejection of an application of the Cumberland County Railroad Authority to purchase a 28.9-mile feeder line, the Commission affirmed its policy [62] of automatic rejection of feeder line applications when abandonment

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[54] This transaction is discussed in the "Intermodal" chapter.

[55] 49 U.S.C. 10910.

[56] Finance Docket No. 31377, *Wyoming Colorado Railroad Inc.—Feeder Line Acq.—Union Pac. R. Co. Line Between Ontario and Burns, OR* (not printed), served April 3, 1989.

[57] 49 CFR 1151.4(b)(ii).

[58] *Cheney R. Co.—Feeder Line Acq.*, 5 I.C.C.2d 250 (1989).

[59] Imposed in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979).

[60] Finance Docket No. 31012, *Cheney R. Co.—Feeder Line Acq.—CSX Transp., Inc. Line Between Greens and Ivalee, AL* (not printed), served April 28, 1989.

[61] Finance Docket No. 31012 (Sub-No. 2), *Tyson Railroad, Inc.—Pet. for Exemp. from 49 U.S.C. Subtitle IV* (not printed), served August 9, 1989.

[62] *Feeder Railroad Development Program*, 367 I.C.C. 261, 263-67 (1983).

applications are pending.[63] If an abandonment is granted, an interested person may then seek to purchase all or part of the line using the Commission's rules for offers of financial assistance.[64]

New Construction

During the past fiscal year, the Commission granted two exemption requests and one formal application for new construction. The Commission exempted from regulation under 49 U.S.C. 10901 the construction of 7.5 miles of rail line in Shelby, Alabama, by the Southern Electric Generating Company[65] and the construction of approximately 10,000 feet of track at Tongue, Oregon, by the Columbia Astoria Rail Service.[66]

The Commission dismissed as unnecessary a petition for exemption filed by the Burlington Northern Railroad Company for its construction of connector track to reroute overhead traffic. It found that the proposed construction had no effect on service to shippers or on any other transportation interest that would trigger Commission jurisdiction under 49 U.S.C. 10901.[67]

The Commission also approved the application of SPCSL Corp., a subsidiary of Rio Grande Industries, Inc., for the construction of a 6-mile track to connect its newly acquired line between St. Louis and Chicago with a Union Pacific Railroad Company line at Valley Junction, Illinois.[68]

Rates and Practices

The Commission's extensive efforts to improve the accuracy and utility of its regulatory actions resulted in two major improvements to the Commission's regulatory tools. In perhaps the most significant rate-related matter handled this fiscal year, the Commission adopted the Uniform Railroad Costing System (URCS) to supplant Rail Form A as the preferred, general-purpose costing system for regulatory purposes and adopted a mechanism to correlate URCS results with the Rail Form A-premised jurisdictional threshold.[69] In a separate proceeding, the Commission also adopted three modifications to the general-purpose costing system.[70] Those changes had been recommended by the Railroad Accounting Principles Board (RAPB) in its Final Report as a means of improving the accuracy of railroad costing. The modifications include the (1) substitution of depreciation accounting for betterment accounting; (2) replacement of embedded debt cost-of-capital with current cost-of-capital in computing the rate of return on net investment; and (3) elimination of accumulated deferred tax credits from the net investment base.

The second major advance came when the Commission adopted rules authorizing electronic tariff filing (ETF) as an alternative to printed tariffs.[71] It found ETF lawful because it serves the Interstate Commerce Act's notice and archive functions at a reasonable cost

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[63] Finance Docket No. 31429, *Cumberland County Railroad Authority—Feeder Line Application* (not printed), served March 21, 1989; appeal denied in a decision (not printed), served May 24, 1989.

[64] 49 CFR 1152.27.

[65] Finance Docket No. 31498, *Southern Electric Generating Company—Petition for Exemption—Construction of a Rail Line in Shelby County, AL*, and Finance Docket No. 31499, *Southern Electric Generating Company—Petition for Exemption From Regulation Under 49 U.S.C. 10746* (not printed), served September 19, 1989.

[66] Finance Docket No. 31304, *Columbia Astoria Rail Service, Inc.—Construction and Operation Exemption—At Tongue, OR* (not printed), served November 1, 1988.

[67] Finance Docket No. 31290 (Sub-No. I), *Burlington Northern Railroad Company—Construction and Operation Exemption* (not printed), served November 21, 1988.

[68] *Rio Grande Industries, Inc. Et. Al.—Pur. and Track—CMW Ry. Co.*, 5 I.C.C.2d 952 (1989).

[69] *Uniform Railroad Costing System*, 5 I.C.C.2d 894 (1989).

[70] *Modifications to General Purpose Costing System*, 5 I.C.C.2d 880 (1989).

[71] *Electronic Filing of Tariffs*, 5 I.C.C.2d 279 (1989).

to carriers, without compromising the integrity of the tariff library. A one-year transition period was also adopted during which back-up printed tariffs were required for filing, and system implementation was to be monitored by Commission staff. In the same proceeding, the Commission replaced its detailed regulations governing the construction, filing, and maintenance of tariffs with simplified general standards. However, upon the petition of 12 motor carrier rate bureaus and two shipper groups, the Commission stayed the decision to consider whether the new rules may have omitted essential or useful information.[72] The stay remained in effect at the close of the fiscal year.

Although the Commission stayed the ETF rules, it granted the Canadian National Railway (CN) conditional special tariff authority to file its tariffs electronically.[73] In support of its request, CN noted that it was already filing its tariffs electronically with the National Transportation Agency in Canada and has in place an electronic Customer Information System for tariff subscribers. The Commission required CN to provide the Commission with the hardware and software necessary to process CN tariff filings, to file paper tariffs contemporaneously with its electronic tariffs, and otherwise to comply with the Commission's filing requirements.

The Commission continued to reduce its maximum rate reasonableness docket. In fiscal year 1989, only two new rate reasonableness complaints were filed. Meanwhile, the Commission continued to reduce its backlog as longstanding complaints were resolved in the major areas of coal, non-coal, and recyclables. Also, settlements led to the dismissal of four interrelated coal rate investigations,[74] a non-coal maximum reasonableness complaint,[75] and a recyclables complaint.[76]

The Commission issued a significant decision in a coal rate complaint filed under Section 229 of the Staggers Act.[77] That section provided shippers with one final opportunity to challenge rates existing on the effective date of the Staggers Act. The Metropolitan Edison Company (Met Ed), an electric utility, contended that pre-Staggers rates applicable to single-line and interline movements of coal from mines in Pennsylvania, Maryland, and West Virginia to two Pennsylvania generating plants exceeded a maximum reasonable level. The Commission rejected an amended supplemental complaint filed by Met Ed, ruling that it was a new cause of action barred by the 180-day filing deadline in Section 229. The Commission also applied an exception in Section 229(c) to hear the challenge to certain other rates.

The Commission's decision made other significant findings, as well. Relying on longstanding precedent, the Commission rejected Met Ed's contention that an indivisible portion of a joint through rate could be found unreasonable even if the rate for the entire through movement is reasonable. The Commission also rejected certain presumptions of Met Ed's stand-alone model. Having found the single-line rates reasonable, the Commission dismissed complaints

[72] Ex Parte No. 444, *Electronic Filing of Tariffs* (not printed), served March 10, 1989.

[73] Special Tariff Authority Application No. 89-62, *Canadian National Railway* (not printed), served October 12, 1989.

[74] No. 37063 (Sub-No.1), *Increased Rates on Coal, L&N RR, November 1978;* No. 37063 (Sub-No. 2), *Increased Rates on Coal, L&N RR, December 1978;* No. 37063 (Sub-No. 3), *Increased Rates on Coal, L&N RR, December 1978-January 1979;* and No. 37063 (Sub-No. 4), *Increased Rates on Coal, L&N RR, January 1979* (not printed) served December 14, 1988.

[75] No. 40195, *General Electric Co.* v. *Atchison,Topeka and Santa Fe Ry. Co. Et Al.* (not printed), served January 13, 1989.

[76] No. 39324, *Pozzolanic International* v. *Burlington Northern Railroad Co., et al.* (not printed), served August 31, 1989.

[77] *Metropolitan Edison Company* v. *Conrail, Et Al.*, 5 I.C.C. 2d 385 (1989).

to that extent. The proceeding was held open to allow Met Ed to submit further evidence as to joint movements, but its joint rate aspect was subsequently discontinued at Met Ed's request.[78]

In another Section 229 coal case, the Commission found the defendant railroads not market dominant over certain export coal shipments consigned by a broker from points in Utah and Colorado to points in California.[79] The Commission rejected the complainant's theory that stand-alone cost evidence be used as a test of market dominance, finding it both impractical and inconsistent with the two-step approach prescribed by statute.

In an initial decision by an Administrative Law Judge (ALJ), the defendant railroads were found market dominant and their rates unreasonable for various export coal movements through eastern ports.[80] The record was left open for the allocation of damages, and the case was pending on appeal as the fiscal year closed. Three other coal proceedings[81] were consolidated and reopened for further market dominance evidence.

The Commission awarded reparations in a major non-coal case involving the movement of empty, retired railroad cars moving on their own wheels to salvage facilities.[82] Using the revenue/variable cost method,[83] the Commission found that rates from the five origin points to the complainant's railcar scrap and salvage yard at Greggton, Texas were unreasonably high. Maximum reasonable rates were calculated, but the involved parties also were given the option of agreeing to an alternative rate structure if it would yield the same total revenues for the transportation provided.

The Commission reopened the record in a rate reasonableness proceeding, involving the movement of refined cane and beet sugar, to consider additional market dominance evidence.[84] In addition, the Commission, on remand, partially vacated its June 28, 1986, decision concerning the transportation of nuclear wastes.[85] Complaints filed by commercial shippers of nuclear wastes were dismissed, as required by the reviewing court. Complaints involving government nuclear waste traffic were reopened, consistent with the court's decision. At the close of the fiscal year, comments were being filled on how the case should proceed.

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[78] No. 37931S, *Metropolitan Edison Company v. Conrail, et al.* (not printed), served July 6, 1989.

[79] *Westmoreland Coal Sales Co. v. Denver & R.G.W. R. Co.*, 5 I.C.C.2d 751 (1989).

[80] No. 38301S, *Coal Trading Corporation, et al. v. The Baltimore and Ohio Railroad Company, et al*, (not printed), served October 28, 1988.

[81] No. 37063, *Increased Rates on Coal, L&N RR, October 31, 1978;* No. 38025S, *The Dayton Power and Light Company v. Louisville and Nashville Railroad Company* (not printed), served December 14, 1988; and that portion of Ex Parte No. 357, *Increased Freight Rates and Charges, Nationwide-8 Percent,* involving a 13-percent coal rate increase on L&N and its connections.

[82] No. 40073, *South-West Railroad Car Parts Company v. Missouri Pacific Railroad Company* (not printed), served December 12, 1988.

[83] Under this method, an average revenue/variable cost ratio is computed for a valid sample of traffic within the Commission's jurisdiction with transportation characteristics that are the same as or similar to those of the traffic whose rate level is being challenged (issue traffic). If the ratio for the issue traffic exceeds that of the sample, a presumption of unreasonableness arises. This test acts as an indirect measure of Ramsey pricing, allowing rates to cover costs and to reflect the relative demand elasticities of different movements.

[84] No. 38239S, *Amstar Corporation* v. *The Alabama Great Southern Railroad, Et Al.* (not printed), served February 14, 1989.

[85] No. 37891S, *Commonwealth Edison Co., Et Al.* v. *Aberdeen & Rockfish Railroad Co., Et Al.;* No. 37998S, *General Electric Company* v. *Aberdeen & Rockfish Railroad Co., Et Al.;* No. 38004S, *Carolina Power and Light Co., Et Al.* v. *Aberdeen & Rockfish Railroad Co., Et Al.;* No. 38302S, *United States Department of Energy and the United States Department of Defense* v. *Baltimore & Ohio Railroad Company;* and No. 38376S, *United States Department of Energy and the United States Department of Defense* v. *Aberdeen & Rockfish Railroad Co., Et Al.* (not printed), served August 1, 1989.

The Commission also made significant progress in the recyclables area. In the group of cases subject to the Staggers Act's standards for nonferrous recyclables, the Commission found in two complaints [86] that the defendants had unlawfully applied rate increases to individual rates that were already above the applicable revenue/variable cost cap, and reparations were ordered. Three proceedings that had been held in abeyance pending resolution of *Aluminum Association* [87] were dismissed on March 30, 1989, after the complainants failed to respond to a Commission decision questioning whether and how they wished to proceed.

Another group of recyclables cases involved nonferrous movements before December 31, 1980—and thus subject to the 4-R Act's[88] standards—and movements of ferrous recyclables. In an ongoing investigation of pre-1981 movements of recyclables and ferrous recyclables,[89] the Commission modified some of its previous findings, found rail carriers nationwide generally in compliance with 4-R Act standards, and ordered refunds on noncomplying rates. The Commission also determined that discrimination and unreasonableness allegations relating to recyclables and ferrous recyclables movements, respectively after December 31, 1980, would be considered in individual complaint proceedings; that recyclables are subject to the limitations on discrimination remedies set forth in 49 U.S.C. 10741; and that unreasonableness complaints on ferrous recyclables are subject to the statute of limitations in Section 229 of the Staggers Act.

The Commission partially reopened three nonferrous recyclables complaints to consider statute of limitations issues. Consistent with a court remand, the Commission in the first case determined that claims relating to shipments of automobile shredder residue (ASR) accrued upon delivery.[90] Accordingly, it found some claims time-barred and ordered reparations for the others. The Commission reopened on its own motion another case involving the same shipper and commodity, applied the same reasoning, and ordered reparations for claims not time-barred.[91] Finally, in another remanded case, the Commission affirmed its prior conclusion that reparations for California intrastate recyclable shipments were barred by the statute of limitations.[92]

The Commission also considered reasonableness issues pertaining to transportation exempted from regulation under 49 U.S.C. 10505. It ruled in a declaratory order that it has exclusive jurisdiction to determine the lawfulness of a carrier service performed under an

[86] No. 39038, *The Aluminum Association, Inc., Et Al.* v. *Alton & Southern Ry. Co., Et Al.;* and No. 39085, *Reynolds Metal Co.* v. *The Atchison, Topeka and Santa Fe Ry. Co., Et Al.* (not printed), served January 3, 1989 (*Aluminum Association*).

[87] No. 37760, *Aluminum Company of America* v. *Louisville & Nashville R. Et Al.;* No. 39690, *Schuylkill Metals Corp.* v. *Kansas City Southern Railway Co., Et Al.;* and No. 39883, *Versatile Metals, Inc.* v. *The Chesapeake and Ohio Railway Co.* (not printed), served March 30, 1989.

[88] Railroad Revitalization and Regulatory Reform Act of 1976.

[89] Ex Parte No. 319, *Investigation of Freight Rates for the Transportation of Recyclable or Recycled Commodities,* 5 I.C.C.2d 101 (1988); *Id.* (not printed), served September 12, 1989; embraces: Ex Parte No. 270 (Sub-No. 5), *Investigation of Railroad Freight Rate Structure—Iron Ores;* Ex Parte No. 270 (Sub-No. 6), *Investigation of Railroad Freight Rate Structure—Scrap Iron and Steel;* Ex Parte No. 319 (Sub-No. 1), *Further Investigation of Freight Rates for the Transportation of Recyclable or Recycled Material;* Ex Parte No. 349, *Increased Freight Rates and Charges, 1978, Nationwide;* Ex Parte No. 375 (Sub-No. 1), *Increased Freight Rates and Charges—1980 Nationwide Phase II;* and Ex Parte No. 386, *Increased Freight Rates and Charges—Nationwide—1981.*

[90] No. 39814, *Pielet Bros. Scrap Iron & Metal, Inc.* v. *The Atchison, Topeka and Santa Fe Railway Co., Et Al.* (not printed), served January 9, 1989.

[91] No. 39756, *Pielet Brothers Trading Co.* v. *Chicago and North Western Transportation Co., Et Al.* (not printed), served February 17, 1989.

[92] No. 40112, *Aluminum Company of America* v. *The Atchison, Topeka and Santa Fe Railway Co., Et Al.* (not printed), served July 25, 1989.

exemption.[93] The Commission also issued numerous decisions in connection with a pending shipper request to restore regulation of the transportation of potatoes, tomatoes, and brussels sprouts.[94]

The contract process continues to minimize the Commission's rate reasonableness docket. In addition, the contract process has stabilized to the point where, in fiscal year 1989, the Commission was asked to process only four exemption petitions involving contract-related matters. It dismissed a petition to waive undercharges,[95] because the traffic at issue fell within a class exemption,[96] and granted a petition to pay reparations on pre-contract tariff movements [97] that did not qualify for the contract amendment class exemption. Two petitions to waive undercharges were dismissed at the request of the petitioner.[98]

In 1987, the Commission had ordered removal of a "zone of rate flexibility" (ZORF) rate increase and the payment of refunds to a shipper based on a finding that the defendants had violated a 1977 rate prescription.[99] On judicial review, a court disagreed and the Commission accordingly vacated its prior decision.[100]

During the fiscal year, the Commission decided two cases—the first of their type to be filed in many years—involving failures to provide rail service. In both, the Commission found for the shippers and held that the involved embargoes were unlawful and, therefore, that service had been unlawfully denied.[101]

In another area, the Commission resolved a major dispute concerning the use of privately owned, covered hopper cars.[102] The Commission found it an unreasonable practice for a carrier to deny access (except for reasons of safety, mechanical factors, or inadequate track storage space) or to refuse to use non-railroad owned cars when a carrier has no cars of its own available.

In other car service matters, the Commission denied a shipper petition seeking an exemption from the discrimination and anti-rebating provisions of the Elkins Act.[103] The petition was filed in response to the Commission's Office of Compliance and Consumer Assistance court action.

In an initial decision that became administratively final, an ALJ found lawful a change in a carrier's billing practice for "idler" cars used in the movement of oversized electrical equipment and for component parts loaded

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[93] Ex Parte No. 346 (Sub-No. 14B), *Consolidated Rail Corporation—Petition for Declaratory Order—Suspension of Service* (not printed), served June 20, 1989.

[94] Ex Parte No. 346 (Sub-No. 14A), *Rail General Exemption Authority—Miscellaneous Agricultural Commodities—Petition of G. & T. Terminal Packaging Co., Inc., Et Al. to Revoke Conrail Exemption.*

[95] No. 40204, *Southern Pacific Transportation Company, Et Al.—Exemption—Waiver of Undercharges* (not printed), served April 14, 1989.

[96] *Railroad Transportation Contracts*, 4 I.C.C.2d 228 (1988).

[97] No. 40208, *Norfolk and Western Railway Co. and Indiana Harbor Belt Railroad Co.—Exemption—Payment of Reparations* (not printed), served April 5, 1989.

[98] No. 39294, *Seaboard System Railroad, Inc.—Petition for Exemption Under 49 U.S.C. 10505*; and No. 39574, *Seaboard System Railroad, Inc.—Petition for Exemption Under 49 U.S.C. 10505* (not printed), served January 23, 1989.

[99] No. 36114, *Potomac Electric Power Co.* v. *Consolidated Rail Corporation, Et Al.*; and No. 36114 (Sub-No. 1), *Potomac Electric Power Co.* v. *Consolidated Rail Corporation* (not printed), served June 30, 1989.

[100] *Id.* (not printed), served June 30, 1989, in response to 867 F.2d 1439 (D.C. Cir. 1989).

[101] *Overbrook Farmers Union—Petition for Declaratory Order*, 5 I.C.C.2d 316 (1989); and *Louisiana Railcar, Inc.* v. *Missouri Pacific Railroad Co.*, 5 I.C.C.2d 542 (1989).

[102] *Shippers Committee, OT-5* v. *The Ann Arbor Railroad Company, Et Al.*, 5 I.C.C.2d 856 (1989).

[103] No. 40194, *ACF Industries, Inc.—Petition for Exemption* (not printed), served May 10, 1989.

on idler cars.[104] The retroactive application of the tariff charges was disallowed as an unreasonable practice.

In other unreasonable practice cases, a tariff supplement proposing the addition of switching and handling charges on empty cars moved from or to repair facilities was withdrawn and an investigation was discontinued.[105] Also, a tariff restricting the collecton of joint line charges was suspended and an investigation instituted.[106] Finally, the Commission instituted a declaratory order proceeding to determine whether the fear of a secondary boycott could excuse a connecting carrier's refusal to move traffic or honor trackage rights for a struck carrier.[107]

In another proceeding, the Commission found that federal district courts have original jurisdiction over actions by carriers to collect undercharges and vacated a prior declaratory order directing a shipper to pay undercharges.[108] Also, in an initial decision that became administratively final, an ALJ dismissed as time-barred a complaint alleging, among other things, that it was an unreasonable practice to apply a charge that resulted from applying a combination rate that exceeded an existing joint rate.[109]

Only one rail rate bureau matter was pending at the start of the fiscal year. That was dismissed when the Commission, acting on the request of the members of Southern Ports Foreign Freight Committee (SPFFC), canceled the SPFFC agreement and terminated its members' antitrust immunity.[110]

During the year, the Commission issued numerous rules affecting rates and practices. The Commission's cost recovery procedures determine the level of the maximum Rail Cost Adjustment Factor (RCAF). Issued quarterly, the RCAF establishes the adjustment level applicable to maximum railroad rates on market-dominant traffic. In fiscal year 1989, the Commission made two important changes in the methodology for calculating the RCAF.[111] Beginning with the second quarter of 1989, an interest expense element was added to the all-inclusive index of railroad costs. Interest expense had been eliminated as a separate component in 1983 because of indexing difficulties and the inability of interested parties to reach a consensus on an interim approach. Under the new approach, the interest rate for a given year will be determined by dividing the average total debt by interest payments. The index level is then determined by dividing the chosen year's interest rate by the rate for the base year. Because only annual data are available, the index will be determined yearly and will remain constant for that year.

Also beginning with the second quarter of 1989, the all-inclusive index was adjusted for productivity as measured by a multi-year, lagged average.[112]

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[104] No. 40107, *General Electric Company* v. *Atchison, Topeka & Santa Fe Railway Company* (not printed), served November 17, 1988.

[105] No. 40202, *Charges For Empty Tank Cars Moving To And From Repair Facilities, NW and SOU, December 2, 1988* (not printed), served January 3, 1989.

[106] Investigation and Suspension Docket No. 10270, *Restricting Collection of Charges on Jointline Service* (not printed), served August 29, 1989.

[107] No. 40220, *Bessemer and Lake Erie Railroad Company – Petition for Declaratory Order – Interchange Facilities and Trackage Rights* (not printed), served August 10, 1989.

[108] No. 40158, *Chicago and North Western Transportation Company – Petition for Declaratory Order – Movement of New Empty Tank Cars* (not printed), served April 11, 1989.

[109] No. 40190, *Chevron Chemical (Canada) Ltd. v. Missouri Pacific Railroad Company* (not printed), served March 7, 1989.

[110] Section 5b Application No. 4, *Southern Ports Foreign Freight Committee – Agreement*, and Section 5b Application No. 4 (Sub-No. 1), *Southern Ports Foreign Freight Committee – Agreement* (not printed), served June 13, 1989.

[111] *Railroad Cost Recovery Procedures*, 5 I.C.C. 2d 350 (1989).

[112] *Railroad Cost Recovery Procedures – Productivity Adjustment*, 5 I.C.C. 2d 434 (1989); and Ex Parte No. 290 (Sub-No. 5) (89-2), *Quarterly Rail Cost Adjustment Factor* (not printed), served March 22, 1989.

The Commission has requested comments concerning unresolved details in the adjustment methodology.[113]

The Commission also adopted new reporting requirements for Class I railroads[114] to accommodate recent revisions in its revenue adequacy standards.[115] As revised, return on investment (ROI) is calculated on a system basis by combining all Class I railroads under common control if they form a unified, jointly managed system. The calculation includes the results of majority-owned Class I subsidiaries that are integral to railroad operations, income taxes related only to rail operations, and interest income associated with working capital investment.

Finally, the Commission determined that 11.7 percent represented the railroad industry's composite cost of capital for 1988.[116] That cost of capital funding will be used in determining railroad revenue adequacy and for other purposes, including the prescription of maximum reasonable rate levels.

The Staggers Act required the Commission to recertify state agencies regulating intrastate rail rates as their initial five-year certifications expire, and the Commission proposed and adopted simplified recertification procedures for states to follow.[117]

The Commission also considered two petitions involving initial certification. Illinois' initial, five-year certification became effective on September 21, 1989.[118] OKlahoma's provisional certification was continued to allow it to submit revised standards.[119]

Pending final recertification, the Commission also granted Arkansas, North Dakota, South Carolina, Tennessee, and West Virginia provisional certification to continue regulating intrastate traffic beyond the expiration intrastate traffic beyond the expiration date of those states' original certifications.[120] Virginia, the first state to complete the simplified procedures, was recertified to continue regulating intrastate traffic for the five-year period beginning on October 20, 1989.[121] Recertification petitions for Arkansas and North Dakota were pending at the end of the fiscal year.

Joint Rate Surcharges, Cancellations and Competitive Access

Consistent with the trend of the past several years, the nation's railroads continued to make relatively infrequent use of joint rate surcharges and cancellations.

Railroad carrier authority to impose commodity surcharges expired on September 30, 1984. Under a Commission exemption, however, negative surcharges (i.e., allowances) may still be applied. Carriers may also impose sur-

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[113] Ex Parte No. 290 (Sub-No. 7), *Productivity Adjustment – Implementation* (not printed) (Advance Notice of Proposed Rulemaking served April 10, 1989).

[114] *Supplemental Reporting of Consolidated Information For Revenue Adequacy Purposes*, 5 I.C.C.2d 65 (1988).

[115] *See* Ex Parte No. 393 (Sub-No. 1), *Standard for Railroad Revenue Adequacy* (not printed), served December 31, 1986.

[116] *Railroad Cost of Capital – 1988*, 5 I.C.C.2d 508 (1989).

[117] *State Intrastate Rail Rate Authority*, 5 I.C.C.2d 680 (1989).

[118] Ex Parte No. 388 (Sub-No.7), *Intrastate Rail Rate Authority – Illinois* (not printed), served August 22, 1989.

[119] Ex Parte No. 388 (Sub-No. 26), *Intrastate Rail Rate Authority – Oklahoma* (not printed), served July 18, 1989.

[120] Ex Parte No. 388 (Sub-No. 2), *State Intrastate Rail Rate Authority – Arkansas* (not printed), served March 24, 1989; Ex Parte No. 388 (Sub-No. 24), *State Intrastate Rail Rate Authority – North Dakota* (not printed), served July 24, 1989; Ex Parte No. 388 (Sub-No. 29), *State Intrastate Rail Rate Authority – South Carolina* (not printed), served March 24, 1989; Ex Parte No. 388 (Sub-No. 30), *State Intrastate Rail Rate Authority – Tennessee* (not printed), served March 24, 1989; and Ex Parte No. 388 (Sub-No. 35), *State Intrastate Rail Rate Authority – West Virginia* (not printed), served March 24, 1989.

[121] Ex Parte No. 388 (Sub-No. 33), *Intrastate Rail Rate Authority – Virginia* (not printed), served September 19, 1989.

charges on traffic originating or terminating on light-density lines,[122] which were those carrying less than 3,000,000 ton-miles of freight per mile for a revenue-inadequate carrier, or 1,000,000 ton-miles for a revenue-adequate carrier, in the most recent calendar year for which data are available. Surcharges may be applied when existing rates do not provide revenues adequate to cover 110 percent of carrier variable costs or 100 percent of the reasonably expected costs of continuing to operate a line.

In recent years, joint rate surcharge and cancellation activity has subsided to a stable, low level.[123] In most respects, this trend continued during fiscal year 1989. But in one area, joint rate cancellations, the number of filings mushroomed from seven in the previous year to 142.[124] That increase, however, is almost entirely accounted for by a few, small, Class I railroads, including in particular the Soo Line Railroad Company (Soo). The Consolidated Rail Corporation (Conrail), which dominated the surcharge and cancellation activity when authority was first granted, accounted for no surcharge activity and only two joint rate cancellations. Light-density line surcharges were filed mainly by short line and regional railroads.

Only one negative surcharge was filed (the same number as last year), for $400 by the Soo Line to apply on chemical and allied products routed via Soo from Kansas City, Missouri to Chicago. The surcharge expired June 30, 1989.

Railroads filed 24 light-density line surcharges for fiscal year 1989, one more than the previous year. Class I carriers accounted for only four. One was a $750 surcharge by the Southern Pacific Transportation Company and the St. Louis Southwestern Railway Company (SSW) on traffic handled at five SSW stations in Arkansas. The other two appear to be retaliatory actions by the Burlington Northern Railroad Company (BN) and CSX Transportation, Inc. (CSXT) and were withdrawn during the year. Each filed an $850 surcharge on silica sand routed via the other carrier. These surcharges were later canceled. The BN filed a $58 surcharge on traffic handled at specified Iowa and South Dakota stations to cover track rehabilitation work on behalf of a regional railroad authority.

Thirteen Class III railroads filed 20 light-density line surcharges. Many of these are framed very specifically, notably more so than in the past, and apply not only to specific points but to specific commodities, as well. Two examples of these are the Eastern Shore Railroad Inc.'s surcharge on liquefied petroleum gas terminating at Bloxom, Virginia, and the Ontario Midland Railroad Corp.'s surcharge on outbound traffic at Williamson, New York, of fruit juices and canned fruits. The surcharge having the largest revenue impact may be that of Southrail Corporation, which ranges from $50 to $100, depending on the line section involved and covers all traffic on the railroad. The surcharge amounts for all filings ranged from $50 to $2,500 a car, with 14 of the 25 falling in the $100-to-$400 range; five falling below this range; and six exceeding this range (the Southrail surcharge, as a two-part surcharge, is counted as within and below the range). By and large, the revenue impact of the surcharges is expected—as it has been for several years—to be minor. The result of imposition of high surcharge amounts often is simply to reduce the traffic.

About the same number of surcharges were canceled in the fiscal year (seven) as in the previous year (six).

[122] 49 U.S.C. 10705a(b)(1).

[123] Under Section 217(c)(1) of the Staggers Act, the Commission is to include in each of its annual reports an analysis of the preceding year's surcharge and joint-rate cancellation activity.

[124] All counts of surcharges and cancellations cover those items becoming effective during fiscal year 1989, i.e. October 1, 1988, to September 30, 1989, including those actually filed prior to the beginning of the fiscal year.

Class I carriers canceled two surcharges (those mentioned above by BN and CSXT). The balance were filed by five Class III carriers, including one revision from $500 to $100 on a surcharge filed the same year by R.J. Corman. The Wisconsin Central Railroad, Inc. removed one surcharge as a result of a line abandonment. In contrast to light-density surcharges, only Class I railroads filed joint rate cancellations. As noted earlier, the number of cancellations soared over that for the previous year, evidently because of special circumstances, and the cancellations were quite unevenly distributed through the industry. In total, 142 cancellations were registered but, of these, 33 involved obsolete rates. One of Conrail's cancellations involved plasticizers or solvents from its Southern Territory to its Central Eastern Territory. The other involved pipe from Conrail's Southwestern Territory to the Central Eastern Territory.

The cancellations filed by other carriers were far more narrowly framed with respect to commodity and origin/destination points, perhaps accounting for the high numbers registered. The Soo canceled numerous joint rate items in several of its tariffs covering grain products, cement, and coke. The total number of cancellations by Soo was 105, of which 42 involved Canadian destinations and 39 involved former Milwaukee Road tariffs. According to a company official, these cancellations give the Soo more control of pricing and allow it to put in place lower, more usable rates.

The Illinois Central Railroad Company canceled joint rates with CSXT on specific movements of motor fuel antiknock compounds and with Norfolk and Western Railway Company on specific movements of vinylidene chloride. CSXT filed 22 cancellations on a variety of commodities to eliminate obsolete rates in an effort to modernize and computerize its rates and tariffs. Similarly, the Chicago and North Western Transportation Company filed 11 cancellations on various commodities to eliminate obsolete rates.

In summary, the joint rate surcharge and cancellation provisions of the Staggers Act continue to be used, though rather unevenly throughout the industry. They continue to afford flexibility where carriers need it to maintain financial viability and evidently had not caused any competitive harm to shippers or to short line railroads.

During the past fiscal year, the Commission adopted final rules governing the computation of reasonably expected costs for light-density surcharges.[125] The new rules reflect the Railroad Accounting Principles Board's (RAPB) recent findings on surcharge costing. Specifically, the rules: (1) adopt the nominal cost-of-capital rate to calculate return on investment; (2) include projected holding gains (or losses) accruing to a carrier from retention of a line's assets for a one-year period as a reduction (or increase) of the return on investment; and (3) calculate reasonably expected costs using costs anticipated during the 12-month period beginning on the effective date of the surcharge. The Commission also revised its rules to incorporate the principle that abandonment-related income tax liabilities and benefits should be included in the investment base for purposes of computing the return on investment component of reasonably expected costs.[126]

The Commission vacated its 1953 divisions prescription for joint rates between the "Official" and "Southwestern" territories.[127] The prescription previously had been modified to allow departures from prescribed rates when

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[125] *Reasonably Expected Costs*, 5 I.C.C.2d 147 (1988).

[126] Ex Parte No. 402, *Reasonably Expected Costs* (not printed), served November 15, 1988.

[127] No. 29886 (Sub-No. 1), *Official–Southwestern Divisions in the Matter of Joint Rates Between Official and Southwestern Territories* (not printed), served August 10, 1989.

carriers voluntarily reached new divisions agreements.[128]

The Commission continued to implement its 1985 competitive access rules.[129] The rules provide for the prescription of necessary joint rates, through routes, or reciprocal switching arrangements to remedy or prevent actions that contravene statutory competition policies or are otherwise anticompetitive. During the past year, the Commission denied a complaint seeking the imposition of a reciprocal switching arrangement.[130] The Commission found that while the complainant had proper standing and the reciprocal switching proposal appeared practicable, the supporting evidence failed to show discrimination, inefficient routing, actual or threatened competitive harm, or any other anticompetitive conduct (existing or threatened) by the serving railroad.

In another competitive access case, the Commission refused to impose terminal trackage rights over a portion of a two and one-half mile, joint-line movement between a complainant's blast furnace and its foundry.[131] The Commission found that the defendant had not violated, and did not appear likely to violate, the competitive policies of the National Rail Transportation Policy. In response to the complainant's allegation that the resulting rate was unreasonable, the Commission found the assailed rate immune from challenge under Section 229 of the Staggers Act and below the jurisdictional threshold.

The Commission also discontinued two other competitive access cases at the request of the involved parties. One was dismissed after opposing railroads reached a settlement on the terms, conditions, and compensation for interchange operations authorized in a 1987 Commission decision.[132] The other was dismissed after the shipper entered into a transportation contract and withdrew its request.[133] In a third case, the Commission suspended and set for investigation a proposed joint rate surcharge,[134] and the proceeding was discontinued when the tariff was canceled.[135]

Few competitive access cases were pending at the close of the fiscal year. Further progress was made regarding rates via eastern and midwestern gateways canceled by Conrail in 1981. The Commission denied a request to amend a previously filed petition to prescribe rates,[136] and granted the Tennessee Eastman Company's request to withdraw its rate prescription petition following its settlement agreement with Conrail.[137] Only three rate prescription petitions remain pending in this docket and an ALJ is supervising discovery and settlement discussions. The only other remaining proceeding involves the Commission's investigation into a carrier proposal to restructure the switching charges it assesses at the industry, warehouse, and interchange facilities it serves with other line-haul carriers.[138] Responsive actions by a

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[128] *Id.* (not printed), served January 28, 1987.

[129] *Intramodal Rail Competition*, 1 I.C.C.2d 822 (1985).

[130] No. 40118, *Vista Chemical Company v. The Atchison, Topeka and Santa Fe Railway Company* (not printed), served February 14, 1989.

[131] *Shenango, Inc. v. Pittsburgh, Chartiers and Youghiogheny Railway Company*, 5 I.C.C.2d 995 (1989).

[132] Finance Docket No. 30759, *Denver and Rio Grande Western Railroad Company and Missouri-Kansas-Texas Railroad Company v. St. Louis Southwestern Railway Company* (not printed), served January 23, 1989.

[133] No. 40127, *Western Fuels Association, Inc. v. Illinois Central Gulf Railroad* (not printed), served October 12, 1988.

[134] Investigation and Suspension Docket No. 9269, *Surcharge on Ferric Sulphate, Edgewater Branch, NYSW* (not printed), served April 28, 1989.

[135] *Id.* (not printed), served July 21, 1989.

[136] No. 38676 (Sub-No. 1), *Changes in Routing Provisions—Conrail—July, 1981* (not printed), served November 23, 1988.

[137] No. 38676 (Sub-No. 2), *Changes in Routing Provisions—Conrail—July, 1981* (not printed), served March 15, 1989.

[138] No. 40178, *SP/SSW Switching Charges on Carloads of Grain at Kansas City* (not printed), served March 30, 1988.

number of connecting carriers have been included in this investigation.[139]

Abandonments

In fiscal year 1989, the Commission authorized the abandonment of, or discontinuance of service over, 2,231.89 miles of track compared with the 2,996.21 miles approved for abandonment or discontinuance in fiscal year 1988. Although abandonment mileage decreased from last year, the number of miles of track authorized by the Commission to be abandoned remained higher than in fiscal year 1987, when only 1,932.61 miles were authorized to be abandoned.

Carriers may obtain Commission authority to abandon track or discontinue service by filing a formal abandonment application under the public interest and necessity standard of 49 U.S.C. 10903, by filing a notice of exemption for lines that qualify under the Commission's class exemption for lines that have been out of service for two years or more,[140] or by petitioning for an exemption under 49 U.S.C. 10505 from approval under Sections 10903–10904. The Consolidated Rail Corporation (Conrail) also has available the special provisions of the Northeast Rail Service Act of 1981 (NERSA),[141] which provides for automatic approval of Conrail abandonment applications of lines previously designated through notices of insufficient revenue. Conrail may still file NERSA applications for its 32 remaining notices of insufficient revenues, involving 97.38 miles of line, that were filed with the Commission by October 31, 1985.

The Commission's abandonment regulations[142] govern the filing of formal applications. If an abandonment application is not protested within 30 days of its filing, the Commission is required to grant the application within 45 days from the date of filing and issue a certificate within 75 days after the application is filed.[143] If a carrier anticipates little or no opposition, it may file a summary application under 49 CFR 1152.23, which allows the carrier to omit certain documentation.[144]

At the beginning of the fiscal year, 19 applications involving 519.55 miles were pending. An additional application involving 10.75 miles was also pending on an offer of financial assistance. During the year, one proceeding involving 93.80 miles was reopened, and 30 new applications involving 767.48 miles were filed. The new filings represented a significant reduction from the prior fiscal year when 42 abandonment applications involving 1,440.78 miles were filed. The Commission issued decisions on the merits in 44 applications involving 1,138.02 miles. Of these, 30 applications involving 668.18 miles were approved and certificated.[145] Additionally, eight applications involving 309.22 miles were dismissed, rejected or withdrawn, and four applications involving 84.43 miles were dismissed as a result of sales. Two cases involving 76.19 miles were denied on the merits. At the end of the fiscal year, seven applications to abandon 253.56 miles were pending.

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[139] No. 40178 (Sub-No. 1), *Reciprocal Switching Charges, Southern Pacific System* (not printed), served April 5, 1988; No. 40178 (Sub-No. 2), *Switching Charges, Inclusion of Additional Carriers, SPT* (not printed), served November 17, 1988; and No. 40178 (Sub-No. 3), *Increased Multi-Car Switching Charges on Grain, SPT/SSW* (not printed), served May 12, 1989.

[140] The class exemption rules appear at 49 CFR 1152.50.

[141] P.L. 97–35.

[142] 49 CFR Part 1152.

[143] 49 U.S.C. 10904(b); see, e.g., Docket No. AB–55 (Sub-No. 312), *CSX Transportation, Inc. – Abandonment – Between Florence and Timmonsville in Florence County, SC* (not printed), served September 19, 1989.

[144] *Id.*

[145] Of the 30 applications that were certificated, five applications involving 71.15 miles were approved after offers of financial assistance were either rejected or withdrawn.

Of the 30 abandonment applications that were granted, 13 involving 289.69 miles were automatically granted because they were unopposed. Among opposed applications that were granted, one application, involving 93.8 miles, was set for an oral hearing, 12 cases involving 235.65 miles were handled under the Commission's modified procedure, and four applications involving 90.36 miles were not investigated.

The two cases that were denied on the merits were handled under the Commission's modified procedure. In one case, the Commission found that continued operation of a line had not been shown to be a burden on the applicant.[146] In the other case, the Commission denied an application because a railroad failed to provide service as required by statute.[147]

Upon the protest of shippers, the Commission rejected a series of Union Pacific Railroad Company (UP) abandonment applications because UP used 1987 unit costs instead of 1988 unit costs to develop 1988 base year figures and forecast year figures.[148] Commission regulations require use of current figures.

Under the automatic grant provisions of NERSA, five Conrail applications were granted to abandon 29.98 miles. Two applications involving 11.76 miles were pending at the end of the fiscal year. The protracted litigation over Conrail's proposed abandonment of its 30th Street Secondary Track in New York City was dismissed at Conrail's request.[149] However, following this dismissal, adjacent property owners filed an adverse abandonment application,[150] which was accepted by the Commission, and was under consideration at the close of the fiscal year.[151]

Under the class exemption procedures at 49 CFR 1152, Subpart F, which authorize automatic exemption authority for lines that had been out of service two years or more, 18 notices of exemption involving 208.79 miles were pending at the beginning of the fiscal year. During the year, 113 notices involving 1,083.68 miles were filed. This was an increase from last year's 84 filings involving 1,182.95 miles. The Commission allowed 103 notices involving 946.45 notices involving 139.29 miles of track were either dismissed, withdrawn, or rejected. One notice was dismissed[152] because the line was acquired in a feeder line application.[153]

A number of notices were rejected due to insufficiency of environmental

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[146] Docket No. AB-12 (Sub-No. 120), *Southern Pacific Transportation Company—Abandonment Between Wharton and Victoria, TX* (not printed), served March 7, 1989, aff'd. in a decision (not printed), served April 6, 1989.

[147] Docket No. AB-3 (Sub-No. 57), *Missouri Pacific Railroad Company—Abandonment—In Osage County, KS* (not printed), served December 28, 1988, and *see Overbrook Farmers Union Coop. Assoc.—Pet. for Declar. Order*, 5 I.C.C. 2d 316 (1989) in which the Commission found that the carrier had failed to provide service in violation of 49 U.S.C. 11101(a).

[148] Docket No. AB-33 (Sub-No. 58), *Union Pacific Company—Abandonment—Between Colfax and Fairfield in Whitman and Spokane Counties, WA (Tekoa Branch)* and Docket No. AB-33 (Sub-No. 59), *Union Pacific Company—Abandonment—Between Thornton and Seltice in Whitman County, WA (Pleasant Valley Branch)* (not printed), served July 25, 1989.

[149] Docket No. AB-167 (Sub-No. 493N), *Conrail Abandonment of a Portion of the West 30th Street Secondary Track in New York, NY* (not printed), served February 11, 1988.

[150] Docket No. AB-167 (Sub-No. 1094), *Chelsea Property Owners—Abandonment—Portion of The Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY* (not printed), served July 19, 1989.

[151] Some of the issues raised by adverse abandonment applications are discussed in Finance Docket No. 31271, *City of Colorado Springs and Metex Metropolitan District—Pet. for Declaratory Order—Aband. Determination* (not printed), served March 31, 1989.

[152] Docket No. AB-55 (Sub-No. 201X), *CSX Transportation, Inc.—Abandonment—In Blount and Etowah Counties, AL* (not printed), served June 27, 1989.

[153] *Cheney R. Co.—Feeder Line Acq.—CSX*, 5 I.C.C. 2d 250 (1989).

reports.[154] In one instance, adjacent landowners sought to compel abandonment under the exemption procedures. The Commission found that the exemption process cannot be used to force carriers to abandon lines.[155]

For the first time, the Commission revoked use of its class exemption in a proposed abandonment of a section of Conrail's east-west main line running between Columbus, Ohio, and Pittsburgh, Pennsylvania.[156] After the notice of exemption was published in the *Federal Register*, considerable public opposition was received, and the Commission requested further comments concerning the effect of the proposed abandonment on rerouted traffic and on local shipper needs. Use of the exemption was ultimately found to be inappropriate. Another exemption was revoked without prejudice to the refiling of a formal abandonment application because the line segment at issue provided the only rail link to a contiguous line segment for which an offer of financial assistance (OFA) had been received. Since this line segment would carry traffic if the OFA purchase were consummated, the Commission found that use of the class exemption was inappropriate and that a formal abandonment application should be filed if the applicant desired to proceed.[157]

The Commission approved 103 notices of exemption allowing 946.45 miles of line to be abandoned under this procedure. A portion of one line embracing six and a half miles was sold and one proposal was pending on an offer of financial assistance at the end of the year. Eleven other notices, involving 43.18 miles, were being processed at the close of fiscal year 1989.

Petitions for exemption from formal review of abandonment requests are considered individually and are decided under the standards of 49 U.S.C. 10505. Petitions for exemption may be used when a line does not qualify for the class exemption for two-year, out-of-service lines or when carriers believe a full scale application is unnecessary.[158]

At the beginning of fiscal year 1989, 15 petitions for exemption involving 225.94 miles were pending.[159] During the fiscal year, 50 additional individual petitions for exemption were filed involving 616.28 miles of track proposed for abandonment. Of this total of 65 petitions, involving 842.22 miles, 42 petitions were granted involving 587.28 miles, three petitions involving 29.7 miles were dismissed, and 20 petitions covering 225.24 miles of track were pending at the end of the fiscal year.

The Commission dismissed one petition involving an industrial track because, under 49 U.S.C. 10907(b)(1), industrial or spur tracks are statutorily exempt from Commission jurisdiction. Accordingly, no abandonment authority

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[154] *See, e.g.*, Docket No. AB-55 (Sub-No. 317X), *CSX Transportation, Inc.—Abandonment Exemption—In Nicholas County, WV* (not printed), served August 29, 1989. Because the environmental report was rejected by the Director of the Commission's Office of Transportation Analysis, the notice of exemption was rejected pursuant to Ex Parte No. 274 (Sub-No. 8), *Exemption of Out-of-Service Rail Lines* (not printed), served December 29, 1987.

[155] Docket No. AB-313X, *Richard D. Wood, Jr. Et Al—Abandonment Exemption—Line of the Southeastern Pennsylvania Transportation Authority Between Wawa and Chedds Ford, PA* (not printed), served February 10, 1989.

[156] Docket No. AB-167 (Sub-No. 1088X), *Consolidated Rail Corporation—Exemption—Abandonment of the Wolrton Secondary Track in Harrison and Tuscarawas Counties, OH* (not printed), served June 14, 1989.

[157] Docket No. AB-55 (Sub-No. 284X), *CSX Transportation, Inc.—Abandonment Exemption—In Fayette and Nicholas Counties, WV* (not printed), served August 21, 1989.

[158] Docket No. AB-301 (Sub-No. 3X), *Southrail Corporation—Abandonment Exemption—Jones and Jasper Counties, MS* (not printed), served April 3, 1989.

[159] The prior annual report incorrectly reported that 208.17 miles of track were included in the number of petitions pending at the end of the fiscal year.

is required to abandon such track or to cease service on it.[160]

The Commission also denied a petition for exemption filed by the Wisconsin Department of Transportation (WisDot), which sought to compel the Wisconsin Central Ltd. to abandon a portion of a line in Menasha, Wisconsin, to facilitate construction of the Tri-County Freeway.[161] The Commission denied WisDot's petition, again finding that the exemption process cannot be used to require an action by a carrier. The Commission also found that ordering a line to be abandoned over the objections of a carrier and a shipper would not meet the goals of the Staggers Act or the National Rail Transportation Policy. The Commission noted that WisDot could file a formal adverse abandonment application under 49 U.S.C. 10903, *et seq.* However, WisDot did not appeal the decision or file a formal application.

In fiscal year 1989, the Commission revised its abandonment regulations by adopting several recommendations of the Railroad Accounting Principles Board. The modifications include: (1) replacement of the real cost of capital rate with the nominal cost of capital rate to determine opportunity costs in abandonment proceedings and return on investment in subsidy proceedings; (2) consideration of projected holding gains (or losses) that would accrue to a carrier from retention of the branch line assets for a one-year period as a reduction (or increase) of opportunity costs in abandonment proceedings and return on investment in subsidy proceedings; and (3) adding new "Forecast Year" data showing the projected operating results on a line subject to an abandonment proceeding.[162] The forecast year projects the operating results of the line during the 12-month period beginning with the month that the abandonment application is filed.

The Commission continues to use the real pre-tax cost of capital for cost items that appreciate in value over time. The rate of return figure is adjusted periodically to reflect the most recent cost of capital determination by the Commission. The 1988 cost of capital was found to be 12.7 percent[163] compared with the Commission's 1987 cost of capital determination of 12.6 percent.[164]

Following a court remand,[165] the Commission modified its abandonment regulations to place return on investments in equipment in the avoidable cost category rather than in the opportunity cost category.[166] The court reasoned that Congress had assumed as a matter of law that abandonments would spare railroads the cost of new equipment and therefore these costs should be treated as directly attributable to the line.

The Commission also adopted a technical revision to recognize income tax liabilities in its regulations governing applications to abandon or discontinue service over rail lines and offers of financial assistance.[167] The regulations had inadvertently omitted income

[160] Docket No. AB-311X, *White River Park Development Commission—Abandonment Exemption—Conrail Industrial Track at Indianapolis, IN* (not printed), served April 25, 1989.

[161] Finance Docket No. 31303, *Wisconsin Department of Transportation—Abandonment Exemption* (not printed), served December 5, 1988.

[162] *Abandonment Regulations—Costing (Implementation of the Railroad Accounting Principles Board Findings)*, 5 I.C.C.2d 123 (1988).

[163] *Railroad Cost of Capital—1988*, 5 I.C.C.2d 508 (1989).

[164] *Railroad Cost of Capital—1987*, 4 I.C.C.2d 621 (1988).

[165] The D.C. Court of Appeals in *Association of American Railroads v. I.C.C.*, 846 F.2d 1465 (D.C. Cir. 1988), overturned the Commission's decision in *Abandonment Regulations—Costing*, 3 I.C.C.2d 340 (1987), which had reclassified equipment investment from treatment as an avoidable operating cost to an economic cost.

[166] *Abandonment Regulations—Costing (Revised Treatment of Return on Investment-Equipment)*, 5 I.C.C.2d 483 (1989).

[167] Ex Parte No. 274 (Sub-No. 11), *Abandonment Regulations—Costing* (not printed), served November 10, 1988.

tax liabilities and referred only to income tax benefits.[168] The methodology governing the use of property taxes as avoidable costs of operation was further modified to disallow such costs unless an abandoning railroad's system-wide property tax liability can be demonstrated to decrease commensurately following abandonment.[169]

The Commission continued to study whether the possibility that a shipper could purchase or subsidize a rail line should be considered in analyzing an application for abandonment and, if so, how the issue should be factored into the decision on whether to grant or deny the abandonment.[170]

The Commission imposed public use conditions[171] under 49 U.S.C. 10906 in 19 cases. Under a public use condition, the Commission may prohibit disposal of rail assets for a maximum period of 180 days to allow time for parties to develop alternative uses for the line or the right-of-way. These uses may include highway construction, mass transportation, and trail development.[172]

All abandonments approved by the Commission are also subject to forced sale or subsidy through offers of financial assistance. Under NERSA, these offers are the single statutory exception to automatic approval for Conrail abandonments. The Commission considered 22 offers of financial assistance, which resulted in the sale of five lines, involving 90.93 miles. This was the first full year in which the Commission considered offers of financial assistance for continued rail service in conjunction with exempt abandonments or discontinuances. Nine of the 22 offers were made in connection with exempt abandonments, resulting in the sale of one line segment and an annual subsidy in another.[173]

If the Commission sets the terms of an offer of financial assistance, and the offeror accepts, the carrier is required to transfer the line and the abandonment proposal is dismissed.[174] One offer to purchase involved the highly publicized abandonment of a 10.75-mile line running through Georgetown, in the District of Columbia, and into Montgomery County, Maryland. Following ICC approval, the portion of the line within the District of Columbia was abandoned, and the 6.45-mile portion of the line in Montgomery County was purchased by the county under a voluntary agreement with the carrier.[175]

The Commission continued to study the issue of whether a carrier-vendor should be compensated for the tax liability it will incur upon the sale of personal property in a forced sale under the financial assistance procedures. Compensation would be limited to instances where the carrier would have used the personal property attributable

[168] Adopted in *Abandonment Regulations—Costing*, 3 I.C.C.2d 340 (1987).

[169] *Rail Abandonments—Property Tax Expense*, 5 I.C.C.2d 640 (1989).

[170] Ex Parte No. 274 (Sub-No. 18), *Rail Abandonments—Consideration of Possible Sale or Subsidy of Rail Line in Analysis of an Abandonment Application Under 49 U.S.C. 10903* and Docket No. AB-19 (Sub-No. 110B), *Buffalo, Rochester and Pittsburgh Railway Company and the Baltimore and Ohio Railroad Company—Abandonment and Discontinuance of Service in Indiana County, PA* (not printed), served January 25, 1988.

[171] 49 CFR 1152.28.

[172] *Rail Abandonments—Public Use Conditions*, 4 I.C.C.2d 109 (1987).

[173] Docket No. AB-55 (Sub-No. 250), *CSX Transportation, Inc.—Abandonment Exemption—Fayette and Nicholas Counties, WV* (not printed), served January 10, 1989.

[174] *See, e.g.*, Docket No. AB-1 (Sub-No. 217), *Chicago and North Western Transportation Company—Abandonment—Between Steamboat Rock and Hampton in Hardin and Franklin Counties, IA*, abandonment approved in a decision (not printed), served February 16, 1989; purchase price set in a decision (not printed), served May 26, 1989; transfer approved and application dismissed in a decision (not printed), served June 12, 1989.

[175] Docket No. AB-19 (Sub-No. 112), *The Baltimore and Ohio Railroad Company, Metropolitan Southern Railroad Company and Washington and Western Maryland Railway Company—Abandonment and Discontinuance of Service—In Montgomery County, MD, and the District of Columbia* (not printed), served December 14, 1988.

to the abandonment elsewhere on its system.[176]

During the year, the Commission also imposed conditions on some abandonments to ensure compliance with the National Environmental Policy Act (NEPA),[177] the Energy Policy and Conservation Act (EPCA),[178] the National Historic Preservation Act,[179] the Endangered Species Act,[180] the Coastal Zone Management Act,[181] the Clean Water Act,[182] Rivers and Harbors Act of 1899,[183] the Migratory Bird Treaty Act of 1986,[184] and the National Trails System Act.[185] Compliance with the environmental statutes may delay the process of abandoning a line. Whenever an informed decision on pending environmental and historic preservation issues cannot be made prior to the date an out-of-service abandonment class exemption would otherwise become effective, its effectiveness is automatically stayed under new rules adopted this year.[186]

The Commission imposed conditions in approximately 40 abandonments limiting salvage of rail properties to address concerns raised in its environmental assessments. In several cases involving the Clean Water Act or the Rivers and Harbors Act, the Commission required carriers to consult with U.S. Army Corps of Engineers or state or local authorities to determine any necessary measures to preclude post-salvage flooding,[187] to preserve wetlands, and to control the flow of surface waters,[188] or before removing piers or releasing dredged or fill material into waterways.[189] Salvage conditions may also be imposed to reflect voluntary agreements addressing specific local concerns.[190] In addition to state and local agencies, the Commission also required salvage consultations with the U.S. Coast Guard and the U.S. Department of Agriculture.[191]

Under the Endangered Species Act, the Commission required consultation with the U.S. Fish and Wildlife Service or state or local authorities.[192] These conditions were imposed during the year to protect many species, including the blue sucker, Neosho madtom, and warty-backed mussel,[193] the black-footed ferret, the peregrine falcon, and the bald eagle,[194] and the threatened plant species, the dwarf lake iris.[195]

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[176] Ex Parte No. 274 (Sub-No. 19), *Increasing the Offer of Financial Assistance Purchase Price to Compensate for Tax Liability Incurred on the Sale of Personal Property* (not printed), served July 27, 1988.

[177] 42 U.S.C. 4331-4335.

[178] 42 U.S.C. 6362(b) and 49 CFR 1106.

[179] 16 U.S.C. 470, *et seq.*

[180] 16 U.S.C. 1531-1542. *See also* the implementing regulations of U.S. Fish and Wildlife Service and National Marine Fisheries Service, 50 CFR 402.

[181] 16 U.S.C. 1451, *et seq.*, and 15 CFR Part 930.

[182] 33 U.S.C. 1344, and 33 CFR 323.1.

[183] 33 U.S.C. 403.

[184] 16 U.S.C. 701, *et seq.*

[185] 16 U.S.C. 1247, section 8(d), and 49 CFR 1152.29.

[186] *Exemption of Out-of-Service Rail Lines*, 4 I.C.C.2d 400 (1989).

[187] Docket No. AB-6 (Sub-No. 310X), *Burlington Northern Railroad Company—Abandonment Exemption—In Denver County, CO* (not printed), served August 2, 1989.

[188] Docket No. AB-290 (Sub-No. 89X), *Norfolk and Western Railway Company—Abandonment Exemption—Between Briery and Abilene Connection, VA* (not printed), served August 1, 1989.

[189] Docket No. AB-55 (Sub-No. 281X), *CSX Transportation, Inc.—Abandonment Exemption—In Newport News, VA* (not printed), served September 1, 1989.

[190] Docket No. AB-167 (Sub-No. 1093X), *Consolidated Rail Corporation—Abandonment Exemption—In Broome County, NY* (not printed), served August 31, 1989.

[191] Docket No. AB-159 (Sub-No. 2X), *The Monongahela Railway Company—Abandonment Exemption—In Marion County, WV* (not printed), served March 28, 1989.

[192] *Id.*

[193] Docket No. AB-6 (Sub-No. 300), *Burlington Northern Company—Abandonment—In Crawford and—Labette Counties, KS* (not printed), served February 9, 1989.

[194] Docket No. AB-1 (Sub-No. 228X), *Chicago and North Western Transportation Company—Abandonment Exemption—In Converse and Natrona Counties, WY*, imposed in a decision (not printed), served May 12, 1989, and removed in a decision (not printed), served June 27, 1989.

Conditions were imposed in approximately 41 abandonments either to document historic properties or to assist in their preservation.[196] Historic preservation conditions may be removed to allow the conveyance of properties for preservation purposes.[197] The Commission declined to impose one requested historic protection condition[198] because the action, a discontinuation of service, was not an "activity . . . that can result in changes in the character or use of the historic properties."[199]

In 16 abandonment proceedings, the Commission issued either Notices or Certificates of Interim Trail Use (NITU or CITU) under the National Trails System Act[200] to permit use of railroad rights-of-way approved for abandonment as recreational trails. These rights-of-way are placed in a "rail bank," and are available for future restoration of rail service.[201] Under the Commission's rules, interim trail use is dependent on the voluntary agreement of the carrier, and a right-of-way may be transferred to an interested third party only if the carrier agrees to a transfer[202] If the carrier does not agree, the trail use request is denied.[203] Parties attempting to negotiate a trail use agreement are normally accorded 180 days to reach a final agreement; however, extensions are available.[204]

The Commission has issued trail use certificates over the objections of adjacent landowners with reversionary interests, and this subject continues to be controversial, both before the agency and in the courts. In one exemption proceeding,[205] the Commission affirmed that, as an independent regulatory agency, it is not obliged to make a Takings Implications Assessment in interim trail use grants, as is required by Executive Order 12630.[206] In response to a court remand,[207] the Commission found[208] that it was not the proper forum to consider the claims of reversionary land holders and found that

[195] Docket No. AB-293X, *Detroit & Mackinac Railway Company—Abandonment Exemption—In Cheboygan and Presque Isle Counties, MI* (not printed), served September 6, 1989.

[196] *See, e.g.*, Docket No. AB-1 (Sub-No. 201X), *Chicago and North Western Transportation Company—Abandonment Exemption—In Marquette County, MI*, historic preservation condition imposed in a decision (not printed) served May 22, 1989, and removed after compliance in a decision (not printed) served June 26, 1989.

[197] Docket No. AB-290 (Sub-No. 4), *Southern Railway Company—Abandonment—In Dallas and Perry Counties, AL* (not printed), served December 29, 1988.

[198] Docket No. AB-309X, *Cimarron River Valley, Railway Company—Discontinuance Exemption—In Pawnee and Payne Counties, OK* (not printed), served June 15, 1989.

[199] *See* 36 CFR 800.2(o).

[200] 16 U.S.C. 1247(d).

[201] *Rail Abandonments—Use of Rights-of-Ways As Trails*, 2 I.C.C.2d 591, at 599 (1986).

[202] Docket No. AB-33 (Sub-No. 55), *Union Pacific Railroad Company—Abandonment—Between Echo and Park City and Between Keetley Junction and Phoston, In Summit and Wasatch Counties, UT* (not printed), served February 13, 1989.

[203] *See, e.g.*, Docket No. AB-1 (Sub-No. 211), *Chicago and North Western Transportation Company—Abandonment Between Marshalltown (Powerville) and Cedar Falls Junction and Between Hicks and Kike—In Marshall, Tama, Grundy and Blackhawk Counties, IA* (not printed), served August 1, 1989.

[204] Docket No. AB-290 (Sub-No. 34), *Wabash Railroad Company and Norfolk and Western Railway Company—Abandonment and Discontinuance of Service—Between Pine and Wakarusa in St. Joseph and Elkhart Counties, IN*, in decisions (not printed), served October 4, 1988, May 5, 1989, and August 4, 1989.

[205] Docket No. AB-6 (Sub-No. 299X), *Burlington Northern Railroad Company—Abandonment Exemption—In Skagit County, WA*, in decisions (not printed), served December 19, 1988, and June 23, 1989.

[206] 53 Fed. Reg. 8859, March 18, 1988, and *see The Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings*, issued June 30, 1988, and published at 18 *Envtl. L. Rep.* 35160 (1988), Supplemental Guidelines issued January 23, 1989.

[207] *National Wildlife Federal* v. *I.C.C.*, 850 F.2d 694 (D.C. Cir. 1988).

[208] *Rail Abandonments—Use of Rights-of-Way as Trails*, 5 I.C.C.2d 370 (1989).

landowners could present their claims to the United States Claims Court pursuant to the Tucker Act.[209]

At the request of the National Association of Reversionary Property Owners, the Commission considered whether to impose expanded reporting requirements for trail use and to require trail user groups to identify adjacent property owners of trail use, establish standards for maintenance, and monitor property tax payment by trail user groups. The Commission found that these additional requirements were inconsistent with the Commission's limited role in trail use, would infringe on legitimate state and local law enforcement, and denied the request.[210]

The Commission determined that the only environmental analysis required for abandonment cases in which trail use is involved concerns the abandonment of rail services (*i.e.*, the impact of traffic diversion to other rail lines or transportation modes and the disruptive consequences of removing track and associated structures).[211] No environmental concerns affect the Commission's issuance of a NITU or a CITU because the Commission's authority is ministerial in nature. Therefore, the Commission has no authority to deny or condition trail use agreements and is required to grant any agreement provided that the requirements of Section 1247(d) of the Trails Act have been met. Furthermore, whether trail use will be implemented over an abandoned line has no bearing on the ICC's decision to grant or deny an abandonment request.[212] Nevertheless, the Commission noted that trail use most comply with state and local land use plans, zoning ordinances, and public health and safety legislation.

In another case, where the property being sold might have been exempt under 49 U.S.C. 10907(b) from the statutory abandonment procedures, the parties negotiated a settlement voluntarily establishing trail use outside the Trails Act procedures, and the proceeding was dismissed.[213]

The Commission also asserted its jurisdiction to impose a trail use condition in a case more than two years after an exemption had become effective. This action was found to be appropriate because of the absence of justifiable reliance on the abandonment authority, the pendency of timely filed petitions for reconsideration and judicial review, and the public policies favoring trail use and rail banking.[214]

At the close of the fiscal year, the Commission was considering a petition to institute a rulemaking proceeding[215] to implement the National Trails System Improvements Act of 1988.[216] The Act requires that U.S. land interests in rights-of-way approved for abandonment remain titled to the U.S. after abandonment, except for lands that are parts of public highways.

Rail Labor Issues

Labor relations continued to have a significant impact on the industry and on the Commission's activities. One major case involing the Commission's policy of not imposing labor protection on short line sales was reviewed by the

[209] 28 U.S.C. 1491.

[210] Ex Parte No. 274 (Sub-No. 13), *Rail Abandonments—Use of Rights-of-Way as Trails—Supplemental Trails Act Procedures* (not printed), served May 26, 1989.

[211] *Iowa Southern R. Co.—Exemption—Abandonment*, 5 I.C.C.2d 496 (1989).

[212] Napa Valley Wine Train, Inc.—*Petition for Declaratory Order*, 4 I.C.C.2d 720 (1988).

[213] Finance Docket No. 31292, *Rails-to-Trails Conservancy, Et Al., Petition for Declaratory Order* (not printed), served March 17, 1989.

[214] Docket No. AB-3 (Sub-No. 60X), *Missouri Pacific Railroad Company—Exemption—Abandonment in Shawnee and Osage Counties, KS* (not printed), served May 24, 1989.

[215] Ex Parte No. 274 (Sub-No. 13A), *Rail Abandonments—National Trails System Improvements Act.*

[216] Pub. L. No. 100-470 (October 4, 1988).

Supreme Court.[217] New issues also arose in connection with sales or leases of rail lines to existing short line carriers. In addition, several arbitration appeals presented issues not previously considered by the Commission.

Commission consideration of arbitration decisions stems from the *Lace Curtain* case,[218] in which the Commission asserted its authority to review the merits of decisions of arbitrators deciding claims concerning Commission-imposed, employee protective conditions. The most significant arbitration appeal heard by the Commission in fiscal year 1989 involved the Commission's extraordinary labor protection conditions imposed on Guilford Transportation Industries, Inc.'s use of the Commission's class exemption for intercorporate transactions. The Commission required the negotiation of an implementing agreement and, if necessary, binding arbitration.[219] Negotiations failed, and the arbitrator issued his decision.

The Commission affirmed in part and reversed in part the arbitrator's decision. It also returned certain issues to the arbitrator for fact-finding, and, if necessary, further mediation towards an implementing agreement. Failing mediation, the arbitrator was directed to undertake further binding arbitration.[220] Subsequently, Guilford's subsidiary, Springfield Terminal Railway Company (ST), entered into negotiations with the United Transportation Union and revised the existing collective bargaining agreement. However, the Railway Labor Executives' Association (RLEA) filed a petition for clarification of the Commission's affirmation of the arbitrator's decision and a petition requesting that the Commission order ST to cease and desist from certain practices. ST argued that the new collective bargaining agreement constituted the necessary implementing agreement. These matters were pending at the close of the fiscal year.

In other arbitration cases, the Commission upheld an arbitrator's decision denying a claim for benefits.[221] Following the lease of one of the Maine Central Railroad Company's lines to another carrier, the claimant was subjected to a series of displacements and ultimately furloughed without recall. The Commission affirmed the arbitrator's rejection of the argument that "but for" the lease, the claimant would not have been adversely affected and concluded that the furlough resulted from a decline in the carrier's business and not from the lease.

Employees of a rate bureau requested Commission review of an arbitration decision denying benefits under Section 219 of the Staggers Act, which provides that labor protective conditions be imposed if regulatory reform actions adversely affect rate bureau employees. The Commission denied the petition, finding no egregious error, lack of impartiality, or procedural irregularity in the arbitrator's decision.[222] The Commission also concluded that the arbitration decision was consistent with statutory policy.

In a case that considered the effect on a carrier's employees caused by the transfer of its Accounting Department from Cleveland to St. Louis, the Commission deferred to the expertise of the arbitrator and declined to review an ar-

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[217] *Pittsburg & Lake Erie R. Co., v. R.L.E.A.*, *491 U.S. _____; 105 L. Ed 2d 415; 109 S. Ct. 2584 (1989).*

[218] *Chicago & North Western Tptn. Co.—Abandonment, 3 I.C.C.2d 729 (1987) (Lace Curtain), aff'd sub nom. D&H Ry.—Lease & Trackage Rights Exempt. Springfield Term.*, 4 I.C.C.2d 322 (1988).

[219] *D&H Ry.—Lease & Trackage Rights Exempt. Springfield Term.*, 4 I.C.C.2d 322 (1988).

[220] Finance Docket No. 30965, *et al., D&H Ry.—Lease & Trackage Rgts. Exemp.—Springfield Term.* (not printed), served January 10, 1989.

[221] Finance Docket No. 29270 (Sub-No. 1A), *Maine Central Railroad Company—Lease (Arbitration Review)* (not printed), served December 8, 1988. Reopening denied by decision (not printed), served July 28, 1989.

[222] Section 5b Application No. 2 (Sub-No. 1), *Western Railroads—Agreement (AR)* (not printed), served October 6, 1988.

bitral award interpreting the relationship of several collective bargaining agreements and defining the options available to affected employees.[223] The Commission affirmed the standing of employees previously represented by a union in an arbitration proceeding individually to seek Commission review of arbitration awards if the union would not pursue the matter. The Commission also decided that petitions for review of arbitration awards must be filed within 20 days of a final award, and that decision was later codified[224] in a separate decision.[225]

The Commission denied review of an arbitration award arising out of a transaction for which an exemption had been granted under 49 U.S.C. 10505.[226] The award fashioned an implementing agreement that was rejected by certain railroad employees. The Commission emphasized that exemption (rather than approval) does not diminish the ICC's authority to resolve disputes arising from employee protective conditions. On the merits, the Commission found no basis for reversing the arbitrator.

The Commission dismissed without prejudice an appeal of an intermediate arbitration decision, recognizing that interlocutory review of an arbitration panels' intermediate decisions could impede the arbitration process and should not be undertaken unless clearly justified.[227] In another case, the Commission affirmed an implementing agreement based in part on a previously negotiated collective bargaining agreement based in part on a previously negotiated collective bargaining agreement between an acquiring carrier and the union representing the acquiring carrier's own employees.[228] Another case was remanded to an arbitrator[229] because the Commission could not determine whether the correct burden of proof had been applied and whether certain claims were properly excluded.

Two separate but inconsistent arbitration awards addressing essentially the same facts were considered by the Commission in a consolidated proceeding.[230] The Commission had earlier reversed the first award, finding that there was insufficient causal connection between the transaction and the adverse effects on employees to entitle them to protective benefits. The other award had not been previously reviewed. The Commission denied separate petitions seeking reconsideration of its previous reversal of the first arbitrator and review of the other arbitration decision.

The Commission issued a significant decision interpreting its labor protective conditions applying to mergers and inter-carrier line sales.[231] Sales from one carrier to another are regulated under 49 U.S.C. 11343 and are subject to the *New York Dock* labor protective conditions.[232] In this case, the Commission considered the obligations of the purchasing carrier under the *New York Dock* labor protective conditions. The Commission found that under certain circumstances the purchasing carrier, as well as the selling carrier, must negotiate implementing agree-

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[223] *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger*, 5 I.C.C.2d 234 (1989).

[224] *See* 49 CFR 1115.

[225] *Deadline for Rev. Commission Rev. of Arbitration Decisions*, 5 I.C.C.2d 520 (1989).

[226] Finance Docket No. 30582 (Sub-No. 2), *Norfolk and Western Ry. Co. et al.—Contract to Operate and Trackage Rights (AR)* (not printed), served July 7, 1989.

[227] Finance Docket No. 30800 (Sub-No. 28), *Union Pacific/MKT Merger—UTU Implementing Agreement* (not printed), served August 8, 1989.

[228] *Southern Ry. Co. & Norfolk So.Corp.—Pur. IL C. RR.*, 5 I.C.C.2d 842 (1989).

[229] Finance Docket No. 30000 (Sub-No. 47), *Union Pacific Corporation, Pacific Rail System, Inc., and Union Pacific Railroad Company—Control—Missouri Pacific Corporation and Missouri Pacific Railroad Company (Arbitration Review)* (not printed), served June 14, 1989.

[230] *Atl. Rich. Et Al.—Cont—Butte, Anaconda & Pac. Ry. Et Al.*, 5 I.C.C.2d 934 (1989).

[231] *Brandywine Valley R. Co.—Pur.—CSX Transp., Inc.*, 5 I.C.C.2d 764 (1989).

[232] *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979).

ments with affected employees to ensure that they receive full protective benefits. A purchasing carrier that intends to offer any positions to affected employees of the selling carrier must negotiate with them concerning the principles that will govern their selection and integration into the purchaser's work force. The Commission further found that the parties may proceed with the transaction without following the notice and negotiation procedures of the Railway Labor Act (RLA). The labor protective conditions imposed under 49 U.S.C. 11347 were found to accommodate the procedural requirements of the RLA because they provide the machinery for notice, negotiation, and arbitration.

In approving a transaction involving the sale of a line owned by a bankrupt railroad on the verge of cashlessness, the Commission modified the standard *New York Dock* protective conditions in two respects.[233] It reduced the requirement for pre-consummation notice from 90 to 20 days, and allowed the transaction to be consummated prior to reaching an implementing agreement. The changes were found necessary in light of the need to continue uninterrupted service.

In a case on court referral, the Commission concluded that employees hired subsequent to the date of a Commission-approved transaction are not eligible to receive benefits under Commission-imposed labor protective conditions.[234]

In a decision approving a purchase and lease transaction, the Commission reiterated its consistently held position that the immunity conferred by Section 11341(a) supersedes employee protections under the RLA and existing collective bargaining agreements that conflict with the implementation of Commission approved transactions.[235]

In other labor matters, the Commission denied a petition by an employee group seeking to augment labor protections normally provided.[236] The petitioner's request for a declaratory order interpreting a "decline in business" formula contained in existing labor agreements was found to have been directed to the wrong forum, since these agreements provide for arbitration. In another case, the Commission concluded that no labor protective conditions are available under 49 U.S.C. 11347 if a proposed merger is disapproved.[237]

Finally, the Commission addressed whether labor protective conditions should be imposed on a selling carrier in two proceedings.[238] Because these sales are governed by Section 10901, labor protection is not mandatory and, absent exceptional circumstances, these conditions are not imposed. The Commission found an absence of exceptional circumstances warranting the use of its discretionary authority and declined to impose protective conditions.

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[233] *Rio Grande Industries, Et Al—Pur. & Track.—CMW Ry. Co.*, 5 I.C.C.2d 952 (1989).

[234] Finance Docket No. 21478 (Sub-No. 11), *Great Northern Pacific & Burlington Lines, Inc.—Merger—Great Northern Railway In the Matter of James G. Moser and John T. Navin* (not printed), served July 28, 1989.

[235] Finance Docket No. 31388 (Sub-No. 1), *R.J. Corman R./Memphis Line—Purchase and Lease—CSX Transp., Inc., Line Between Warwick and Uhrichsville, OH* (not printed), served June 23, 1989.

[236] Finance Docket No. 25103 *et al.*, *Illinois Central Gulf Railroad Co.—Acquisition—Gulf, Mobile & Ohio Railroad Co., Illinois Central Railroad Co.* (not printed), served April 3, 1989; reconsideration denied by decision (not printed), served September 15, 1989.

[237] Finance Docket No. 30400 (Sub-No. 21), *Santa Fe Southern Pacific Corporation—Control—Southern Pacific Transportation Company* (not printed), served February 9, 1989.

[238] Finance Docket No. 30640, *Rarus Railway Corporation—Exemption from 49 U.S.C. 10901 and 11301* (not printed), served May 9, 1989; and Finance Docket No. 31116, *Buffalo & Pittsburgh Railroad, Inc.—Exemption—Acquisition and Operation of Lines in New York and Pennsylvania*, and Finance Docket No. 31117, *Genesee & Wyoming Industries, Inc., The Arthur T. Walker Estate Corporation and Dumaines and Buffalo & Pittsburgh Railroad, Inc.—Exemption Control* (not printed), served July 10, 1989.

Short Line and Regional Railroads

During the fiscal year, the Commission's Office of Transportation Analysis, jointly with the Department of Transportation's Federal Railroad Administration, completed a survey and issued a report on shipper service and rate experiences with short line and regional railroads created since 1980.[339] This survey, part of ongoing industry monitoring efforts, resulted in a 94-percent response rate and usable data from 493 respondents. Fifty-two percent of the responding shippers considered service by the short line or regional carrier serving them to be better than service by the previous carrier. Forty-two percent considered service to be about the same, while only six percent said it was worse. Twenty-eight percent of the respondents said rates were better, 60 percent said they were about the same, and 12 percent thought that they were worse.

These data support the Commission's policy of encouraging the entry of new regional or local carriers to promote the retention of rail service on lines that are unprofitable or only marginally profitable when operated by trunk line carriers. The percent of respondents reporting better service and rates is substantial. Even though many others find service and rates to be about the same, that reflects a positive result compared, in many cases, to the alternative of eventual abandonment of a line and subsequent loss of rail service.

The Commission remains convinced that new firms are often especially suited to meet regional or local transportation needs. Through development of new marketing and management approaches, they can increase operational flexibility, efficiency, and profitability. This new vitality can make a significant difference in rail transportation service in a region or locality.

However, as the year began carriers evidently continued to take a wait-and-see attitude about potential line sales because of disputed labor issues awaiting Supreme Court review. The Supreme Court issued its opinion on the Railway Labor Act implications of a carrier selling its entire line.[340] Nonetheless, questions regarding the interaction of the Railway Labor Act, the Interstate Commerce Act, and the Norris La Guardia Act were not completely resolved. (*See* "Rail Labor Issues.")

During quarters 1, 2, 3, and 4 of the fiscal year, only 16, 6, 9, and 7 exemption notices, respectively, were published under the class exemption for new carriers acquiring or operating rail lines. Usually, the most common transaction would involve the sale of marginal lines by Class I carriers. This year, however, Class I sales to short lines each quarter numbered only 5, 2, 2, and 3, respectively.[341] The three largest of those transactions involved 169,[342] 134,[343] and 61[344] miles of rail line, while the mileage involved in the remaining nine transactions ranged from 1 to 39 miles.

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[339] *A Survey of Shipper Satisfaction with Service and Rates of Short line and Regional Railroads*, August 1989.

[340] *Pittsburgh & Lake Erie R. Co. v. R.L.E.A.*, 491 U.S. _____; 105 L.Ed.2d 415; 109 S.Ct. 2584 (1989).

[341] Two of these transactions were leases with options to purchase.

[342] Finance Docket No. 31331, *St. Lawrence & Atlantic Railroad Company – Acquisition and Operation Exemption – Certain Rail Lines of Canadian National Railway Company* (not printed), served October 14, 1988. (The lines were in Vermont, New Hampshire, and Maine.)

[343] Finance Docket No. 31341, *Arizona Eastern Railway Company – Acquisition and Operation Exemption – Globe Branch of Southern Pacific Transportation Company* (not printed), served October 31, 1988.

[344] Finance Docket No. 31497, *The Elk River Railroad, Inc. – Lease, Operation and Acquisition Exemption – Line of CSX Transportation, Inc.* (not printed), served July 26, 1989. This transaction involves lease, operation, and possible future acquisition of CSX's Elk River Subdivision between Gilmer and Hartland, WV.

Perhaps as a result of questions surrounding sales to new carries, this year six applications by *existing* short lines were filed and granted pursuant to 49 U.S.C. 11343, for the purchase (or lease) from CSX Transportation, Inc., of 10 lines ranging in length from 5 to 126 miles. Such cases are subject to mandatory labor protection. In one of those cases, the Commission interpreted labor protective conditions as requiring both the buyer and the seller to negotiate an implementing agreement with affected employees of the selling carrier prior to consummation of the transaction, if the buyer intends to offer positions to any of those employees.[245] (*See* "Rail Labor Issues.") Several other purchase applications by existing short line carriers that are owned by large holding companies were pending as the fiscal year ended.[246] Also, during the year three Class III railroads were granted individual exemptions from prior approval requirements for the purchase of 114-,[247] 107-,[248] and four-mile lines from Class I railroads.

The effect labor issues will continue to have on short line sales remained uncertain as the fiscal year ended.

Freight Car Service

Surpluses of railroad-controlled freight cars remained relatively constant in fiscal year 1989. The daily average surplus at the end of September 1989 was 37,188 cars, compared to an average of 35,960 cars at the end of September 1988. The daily average surplus during fiscal year 1989 was 40,837 cars.

On October 1, 1988, Class I railroads reported a combined fleet ownership of 725,561 cars, but by the close of the fiscal year, that ownership level had dropped to 703,117 cars. This was a net reduction in the combined Class I fleet of 22,444 cars, which is the difference between the number of cars installed (6,043) and the number of cars retired or otherwise lost from the control of the Class I carriers (28,487). On September 30, 1989, the entire rail car fleet of Class I, II, and III railroads, private car companies, and shippers consisted of 1,217,678 cars, an overall reduction of 33,900 cars from the prior fiscal year.

The average carrying capacity of a freight car placed into rail service during fiscal year 1989 was 99 net tons, an increase of 5 net tons over per-car tonnage figures registered ten years previously. While the aggregate carrying capacity of cars installed was 598,257 net tons, there was an aggregate capacity loss of 715,278 net tons owing to the retirement of cars accounting for 1,313,535 net tons of capacity.

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[245] *Brandywine Valley R.Co.—Pur.—CSX Transp. Inc.*, 5 I.C.C.2d 764 (1989).

[246] South Carolina Central Railroad Company, Inc., is one such short line seeking to expand its operations. A subsidiary of Railtex, Inc., it: (1) now operates two lines in South Carolina; (2) was authorized to purchase and lease two lines in Georgia and Alabama in Finance Docket No. 31360, *So. Car. Central R. Co. Inc.—Purchase and Lease—CSX Transp. Inc. Lines in Georgia and Alabama* (not printed), served January 10, 1989; (3) was authorized to lease another line in Georgia and Alabama in Finance Docket No. 31392, *So. Car. Central R. Co. Inc.—Lease Exemption—Central of Ga. R Co and The So. Western R. Co.—Line Between Smithville, GA and White Oak, AL* (not printed), served May 15, 1989; and (4) as the fiscal year ended had pending applications to purchase two additional lines in Georgia and South Carolina in Finance Docket No. 31469, *So. Car. Central R. Co. Inc.—Purchase—CSX Transp., Inc. Line Between East Greenville and Laurens, SC*, and Finance Docket No. 31481, *So. Car. Central R. Co. Inc.—Purchase—CSX Transp. Inc., Line Between Dawson and Albany, GA.*

[247] Finance Docket No. 31482, *Mid Michigan Railroad Company, Inc.—Purchase Exemption—The St. Joseph & Grand Island Railroad Company Line Between St. Joseph, MO and Upland, KS* (not printed), served August 7, 1989. (Union Pacific Railroad Company conducted marginally profitable operations over the line under a lease.)

[248] Finance Docket No. 31444, *Austin & Northwestern Railroad Company, Inc.—Acquisition and Operation Exemption—Missouri Pacific Railroad Company* (not printed), served May 22, 1989.

Fiscal year 1989 freight car loadings totaled 17,675,856, a decrease of 217 cars from the fiscal year 1988 car loading total of 17,676,073. Relative to individual commodity loadings, coal ranked first with 6,082,303 coal-loaded cars, an increase of 153,692 cars over the 5,928,611 cars loaded in fiscal year 1988. Cars carrying grain ranked second in total loadings with 1,449,352 cars, down from the 1988 loading figure of 1,611,234 cars. The third heaviest commodity loadings were chemicals and allied products, with 1,413,232 cars during the reporting period, or 73,536 carloads over the 1,339,696 cars loaded in fiscal year 1988. Car loadings of motor vehicles and equipment increased by 42,927 from 967,863 cars in fiscal year 1988, to 1,010,790 cars in fiscal year 1989. (The 1988 loading figures noted above for grain, chemicals and allied products, and motor vehicles and equipment are revisions of the data reported in the previous annual report.)

While overall car loadings showed no noticeable change in fiscal year 1989 compared to fiscal year 1988, coal loadings increased 2.6 percent and accounted for 34.4 percent of all cars loaded. The largest percentage increase over fiscal year 1988 was 5.5 percent in the loading of chemicals and allied products, followed by a 4.8-percent increase in petroleum products, and a 4.4-percent increase in cars loaded with motor vehicles and equipment.

In fiscal year 1989, there were 5,836,198 trailers/containers loaded, a 1.9-percent increase over fiscal year 1988's total of 5,728,702 similarly loaded trailers/containers.[249]

The locomotive ownership of Class I railroads on October 1, 1988, consisted of a total of 19,894 units, while on October 1, 1989, such ownership was down to 19,767 units, a 127-unit reduction. At the end of fiscal year 1989, Class I railroads had 74 multipurpose locomotives on order.

Passenger Service

On October 18, 1988, the Chicago South Shore and South Bend Railroad (CSSSB) filed an emergency petition for exemption to suspend its interstate rail passenger operations between South Bend, Indiana, and Chicago, Illinois.[250] The Commission denied CSSSB's exemption petition and instead treated it as a service discontinuance request under 49 U.S.C. 10908.[251] Using an expedited schedule, the Commission instituted an investigation and received statements opposing the discontinuance request from the State of Indiana, the City of Chicago, their regional commuter authorities, and a number of rail employee unions.

The Commission acknowledged that CSSSB provided a valuable passenger service, but found that the financial losses to CSSSB from its unresolved subsidy problems with local commuter authorities and the risk to employees and passengers from underinsured operations weighed in favor of granting the carrier's request.[252] The Commission authorized CSSSB to discontinue its passenger service after January 1, 1989, but required the carrier to maintain its current insurance levels and encouraged the parties to negotiate an alternative to cessation of service. Prior to the effective date of service discontinuance, the Commission granted the parties' joint request to extend passenger operations for an additional five months. On April 7, 1989, CSSSB filed a bankruptcy petition under chapter 11 of the Bankruptcy Code.

[249] Effective January 1, 1989, statistical accounting for trailer-on-flatcar/container-on-flatcar loadings by flatcar was eliminated in favor of accounting for the number of trailer/container units loaded.

[250] 49 U.S.C. 10505.

[251] Finance Docket No. 31348, *Chicago South Shore and South Bend Railroad Discontinuance of Passenger Trains Under 49 U.S.C. 10908* (not printed), served October 31, 1988.

[252] *Id.*, served November 23, 1988.

In subsequent decisions, the Commission extended its orders requiring CSSSB to continue rail passenger service. At the end of the fiscal year, CSSSB continued to provide passenger service and was negotiating to transfer its commuter operation to the Indiana regional authority.

In a series of decisions, the Commission reconsidered and clarified the jurisdiction of the Commission vis-a-vis the Colorado Public Utilities Commission (CPUC) over the operations of The Durango & Silverton Narrow Gauge Railroad Company (D&S). That carrier principally provides scenic rail passenger service over a 49.35-mile, narrow gauge branch line in Colorado.[253]

In another passenger-related proceeding, the Commission upheld its prior decision[254] finding that the Napa Valley Wine Train's freight and passenger operations over a 21-mile line in the Napa Valley in California are clearly linked to and part of the interstate system and therefore are subject to Commission jurisdiction.[255]

The Commission also noted that because the Wine Train had acquired the Napa Valley line under the forced sale provisions of 49 U.S.C. 10905, the Commission's action in the acquisition was only ministerial and did not constitute a "final action" within the meaning of the National Environmental Policy Act. Thus, the Commission held that the transaction did not require an environmental assessment under the California Environmental Quality Act or the National Environmental Policy Act. The Public Utilities Commission of the State of California has sought judicial review of the Commission's decision, and the matter was pending at the close of the fiscal year.[256]

As part of its obligation to resolve disputes between the National Rail Passenger Corporation (Amtrak) and other railroads, the Commission required the Bay Colony Railroad Corporation[257] to provide Amtrak with access and services between Middleboro and Hyannis, Massachusetts, for the operation of its Cape Codder passenger rail service for the 1989 season, and instituted a proceeding to determine just and reasonable compensation.[258] The Commission discontinued this proceeding[259] and another Amtrak proceeding to set compensation[260] after parties in each case advised the Commission that they had resolved the issues voluntarily.

Last year, the Commission for the first time exercised its authority under Section 402(d) of the Rail Passenger Service Act[261] and ordered the Boston and Maine Corporation (B&M) to convey a 48.8-mile segment of the Connecticut River Line and certain other property interests to Amtrak.[262] In the same decision, the Commission granted Central Vermont Railway, Inc. (CV), a related exemption to acquire and operate the

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[253] Finance Docket No. 31024, *The Durango & Silverton Narrow Gauge Railroad Company—Petition for Declaratory Order or Exemption* in decisions (not printed), served August 21, 1987, November 28, 1988, and July 24, 1989.

[254] *Napa Valley Wine Train, Inc.—Pet. for Declaratory Order*, 4 I.C.C.2d 720 (1988).

[255] *Id.*, served January 27, 1989.

[256] *The Public Utilities Commission of the State of California v. ICC*, No. 89-1154 (D.C. Cir., filed March 6, 1989). In a decision served November 3, 1989, the Commission reopened this case for further consideration, subject to the Court's approval, which was granted on February 8, 1990.

[257] *See* 45 U.S.C. 562(a)(1).

[258] Finance Docket No. 31473, *National Railroad Passenger Corporation (AMTRAK)—Application Under Section 402(a) of the Rail Passenger Service Act for Order Requiring the Bay Colony Railroad Corporation to Provide Service and Fixing Just and Reasonable Terms of Compensation and Liability* (not printed), served May 25, 1989.

[259] *Id.*, served August 1, 1989.

[260] Finance Docket No. 31306, *Amtrak and Wisconsin Central Ltd.—Use of Tracks and Facilities and Establishing Just Compensation* (not printed), served November 22, 1988.

[261] 45 U.S.C. 501, *et seq.*

[262] *National Railroad Passenger Corporation—Conveyance of Boston and Maine Corporation Interests in Connecticut River Line in Vermont and New Hampshire*, 4 I.C.C.2d 761 (1988).

line Amtrak had acquired in the Section 402(d) proceeding, subject to the requirement that B&M retain existing trackage rights.[363] As part of the compensation for transferring the line to Amtrak, the Commission granted B&M trackage rights to serve its existing shippers exclusively with a $75,000 per annum trackage rights payment ceiling. Since the conveyance, the parties have operated under an interim agreement. Because the parties were unable to agree on the exact terms and conditions for a permanent agreement, CV filed a petition requesting the Commission to impose the terms and conditions for trackage rights, and the Commission set the matter for handling under modified procedure and adopted the procedural schedule stipulated by the parties.[364] The case was pending at the end of the fiscal year.

Designated agents of the Commission's Office of Compliance and Consumer Assistance issued eight emergency orders under 45 U.S.C. 562(c) to prevent rail passenger service interruptions and granted permission to Amtrak passenger trains to use alternative routes to reach their destinations. These orders are issued whenever a railroad company operating an Amtrak train cannot move the train over its normal route and an alternative route exists over the lines of another carrier.

[363] *Id.*

[364] *Id.*, served May 31, 1989.

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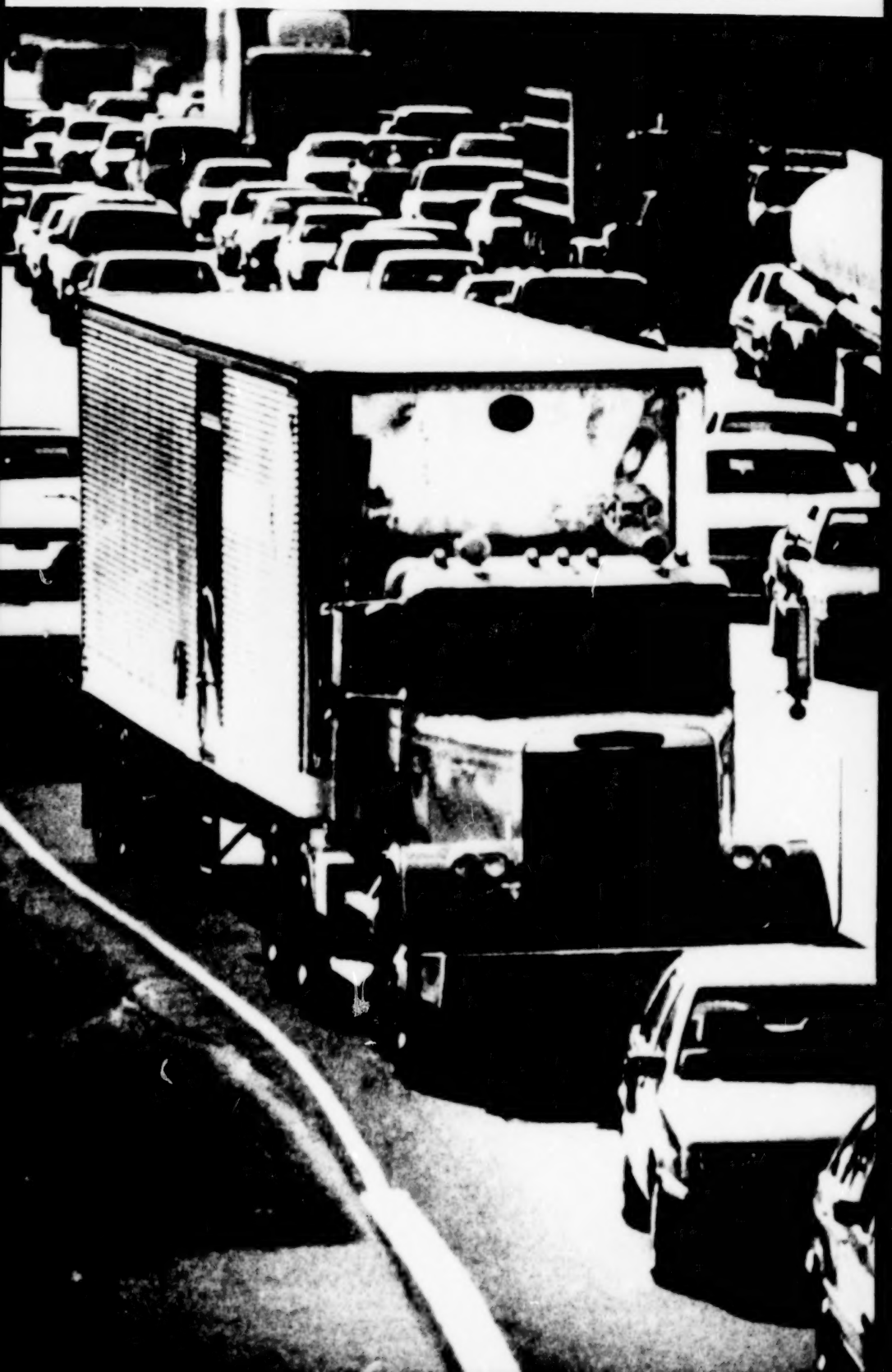

TRUCKING COMPANIES

General Financial Condition

Revenues, earnings and traffic volume of 100 of the nation's largest motor carriers of property increased significantly during the first nine months of fiscal year 1989 compared to the same period of fiscal year 1988. For example, Commission data for these carriers for the six months ending June 30, 1989 and June 30, 1988 show that operating revenues rose 9.3 percent, to almost $9.8 billion, as revenue tons hauled increased 4.7 percent. Net carrier operating income rose 16.9 percent to $426.1 million and net income improved 13.3 percent to $214.4 million. Operating results during the first quarter of fiscal year 1989—from October 1, 1988 to December 31, 1988—also improved significantly for these carriers compared to the same quarter of the previous year, as operating revenues and revenue tons hauled increased 8.4 percent and 9.4 percent, respectively. Net carrier operating income during this period rose $75.2 million to $229.1 million and net income soared $79 million to $126.5 million.

However, severe rate discounting by this industry and a slowdown in the economy caused the earnings of this group of carriers to decline substantially during the last quarter of fiscal year 1989—July 1, 1989 to September 30, 1989—compared to the same quarter of the preceding year. Net carrier operating income decreased 34.8 percent, to $215 million, and net income fell 44.4 percent to $108.8 million. During this period, operating revenues rose only 1.9 percent as tonnage hauled declined 1 percent.

Mergers and Unifications

Motor property carriers continued to use the Commission's expedited exemption procedures to transfer operating authority and to effect changes in their financial structure. During the fiscal year, 211 proceedings were initiated under the Commission's exemption procedures.[1] Likewise, the Commission continued to process small carrier transfers of operating authority on an expedited basis. During the past fiscal year, 673 small motor carrier transactions were filed with the Commission.[2]

The Commission has continued to consider safety fitness as a substantive issue in deciding whether to approve a transfer under 49 U.S.C. 10926 or to grant an exemption under 49 U.S.C. 11343(e).[3] During the fiscal year, the Commission adopted a new procedure for processing finance petitions and applications filed by carriers holding less than satisfactory safety ratings from the U.S. Department of Transportation (DOT). If a carrier's rating is unsatisfactory, or if the carrier transports passengers or hazardous materials and has a conditional rating, the Commission will reject its application or petition for exemption. If the carrier transports property that does not include hazardous materials, and it holds a conditional safety rating, the Commission may approve or exempt the transaction for a one-year period. It will do so if the carrier shows that it has taken measures to correct each safety deficiency and has requested a new DOT safety audit. Prior to expiration of the one-year period, the carrier must submit proof of a safety rating upgraded to "satisfactory" or the approval or exemption of the

[1] The motor exemption authority is codified at 49 U.S.C. 11343(e). Under this statute, the Commission may exempt finance transactions (mergers, leases or purchases of operating authority, acquisitions of stock control, and similar matters) involving motor carriers of property that are otherwise subject to approval under 49 U.S.C. 11343(a).

[2] The motor exemption authority permits the Commission to exempt transactions governed by 49 U S.C. 11341-11351. Small carrier transactions (*i.e.*, where parties' aggregate annual revenues do not exceed $2 million or where an acquiring entity is not a regulated carrier) are governed by 49 U.S.C. 10926.

[3] Regulations making safety fitness an issue in these proceedings were adopted in Ex Parte No. MC-111 (Sub-No. 1), *Transfer Rules*, 4 I.C.C.2d 382 (1988).

transaction will terminate. Under these procedures, the Commission rejected 23 applications or petitions involving carriers holding conditional or unsatisfactory ratings during the fiscal year. It also conditionally granted approval in a number of instances.

In fiscal year 1989, the Commission adopted a streamlined procedure for processing individual petitions for exemption under 49 U.S.C. 11343(e) involving non-rail intermodal parties.[4]

Under the new procedure, which tracks the procedure used for non-intermodal class exemptions, the Commission publishes a notice of exemption that becomes effective 60 days after publication, absent protests. The new procedure is faster than the old procedure, under which the Commission published notice of the proposed exemption and then, after a 30-day protest period, issued a final decision and another notice.

The Commission also adopted simplified final rules governing applications under 49 U.S.C. 11343-11344 to purchase, merge, or acquire control of motor passenger and water carriers. In addition, the Commission revised its rules for requests of temporary authority under 49 U.S.C. 11349 during the pendency of financial transactions under 49 U.S.C. 10926 or 49 U.S.C. 11343-11344.[5] Application forms were discontinued or revised, as appropriate, to effect the new, simplified rules.

In a significant declaratory order proceeding, the Commission determined that its absolute and exclusive jurisdiction over motor property finance transactions under 49 U.S.C. 11343 extends to the transfer of intrastate operating authorities as part of a broader transaction involving a carrier's inter state rights.[6] Accordingly, it concluded that a state regulatory body could not require the involved carrier to seek its approval for the change in control or transfer of the carrier's pertinent intrastate rights.

The Commission regulates the pooling of traffic by motor carriers. Although competition is reduced or eliminated between or among pool participants, the benefits of pooling transactions may nevertheless outweigh their anticompetitive effects. Pooling frequently enables carriers to enter or remain in markets that they might not otherwise be able to serve, strengthens their ability to compete against other carriers or transportation modes, and offers the possibility of lower prices to shippers. In the past fiscal year, the Commission approved a pooling application filed by a major nationwide household goods carrier and its carrier-agents.[7] (See "Household Goods," below, for a full discussion.) The Commission also granted the petition of a group of household goods carriers seeking modification of a previously approved pooling agreement by permitting three carriers to join a relatively small pool from which 14 other carriers had resigned.[8] The Commission also approved four motor passenger carrier pooling applications filed in response to the earlier approval of the GLI Acquisi-

[4] Ex Parte No. 400 (Sub-No. 2), *Exemptions—Finance Transactions—Non-Rail Parties*, 5 I.C.C.2d 726 (1989).

[5] *Pur., Merger & Cont.—Motor Passenger & Water Carriers*, 5 I.C.C.2d 786 (1989).

[6] No. MC-C-30123, *Thurston Motor Lines, Inc., Brown Transport Co., Inc., and Brown Transport Truckload, Inc.—Petition for a Declaratory Order—Transfer of Intrastate Rights Under 49 U.S.C. 11343 (a) & (e)* (not printed), served January 13, 1989, petition to reopen denied in decision (not printed) served March 16, 1989.

[7] No. MC-F-19309, *Wheaton Van Lines, Inc., et al.—Pooling Application* (not printed), served January 23, 1989.

[8] No. MC-F-15793, *Andrews Van Lines, Inc., et al.—Pooling Agreement* (not printed), served June 5, 1989.

tion Company (Greyhound)-Trailways Lines, Inc., merger.[9]

Rates

Under the negotiated rates policy adopted in 1986,[10] the Commission continued to issue decisions in numerous court-referred cases involving negotiated, but unpublished rates. These cases generally involved efforts by trustees of bankrupt carriers to collect tariff rates in lieu of rates that were negotiated, billed and paid, but not filed by the carrier. In all cases, the Commission concluded that negotiated rates existed and that collection of undercharges based on a filed tariff rate would be an unreasonable practice in violation of 49 U.S.C. 10701(a).[11]

The Commission's negotiated rates policy has been upheld on judicial review in the Eighth Circuit.[12] Despite this fact, some courts continued to reject the Commission's opinions, while others refused to refer undercharge cases to the Commission. In an effort to overcome these problems, the Commission modified its 1986 negotiated rates policy statement. In the new policy statement,[13] the Commission declared that: (1) it has primary jurisdiction over unreasonable practice issues; (2) its unreasonable practice determinations are binding and dispositive of the issue of the maximum reasonable compensation the carrier may receive for the transportation involved; (3) the Commission's determinations are subject to review only to determine that they are not arbitrary or capricious; and (4) the Commission will accept negotiated rates cases without court referrals. There is now a conflict in the circuits regarding the Commission's primary jurisdiction. The Supreme Court has granted *certiorari*, and oral argument was held April 16, 1990.

In fiscal year 1988, the National Industrial Transportation League (NITL) had petitioned the Commission for an order declaring that it is an unreasonable practice for a carrier to charge a negotiated but unpublished rate. The Commission instituted a proceeding[14] and requested comments on the proposal, and more than 40 comments were submitted. However, in the revised negotiated rates policy decision mentioned above, the Commission decided to hold the NITL proceeding in abeyance for further consideration in light of experience gained after implementation of the measures enunciated in the new negotiated rates decision.

Since the new policy statement was issued on June 29, 1989, a new issue

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[9] No. MC-F-19190, *Adirondack Transit Lines, Inc., and Pine Hill-Kingston Bus Corp.—Pooling—Greyhound Lines, Inc.* (not printed), served February 8, 1989; No. MC-F-19154, *Capitol Bus Company—Pooling—Greyhound Lines, Inc.* (not printed), served November 28, 1988; No. MC-F-18909, *Southeastern Trailways, Inc. and De Luxe Trailways, Inc.—Pooling—Greyhound Lines, Inc.* (not printed), served November 28, 1988; and No. MC-F-18917, *Carolina Trailways—Pooling—Greyhound Lines, Inc.* (not printed), served November 28, 1988.

[10] *NITL—Pet. to Inst. Rule on Negotiated Motor Car.*, 3 I.C.C.2d 99 (1986).

[11] *See, e.g.*, No. MC-C-30139, *Ideal Chemical & Supply Co. v. Rebel Motor Freight, Inc.* (not printed), served August 21, 1989; No. MC-C-30115, *MCI Telecommunications Corporation v. E.L. Murphy Trucking Company and Sunbelt Freight Traffic Service, Inc.* (not printed), served June 29, 1989; No. MC-C-30116, *Navistar International Transportation Corp.—Petition for Declaratory Order* (not printed), served March 17, 1989; and No. MC-C-30073, *J.W.S. Delavau Co., Inc.—Petition for Declaratory Order* (not printed), served January 11, 1989.

[12] *See INF, Ltd. v. Spectro Alloys Corp.*, No. 88-5324 (8th Cir. August 3, 1989); and *Maislin Industries and U.S. Inc. v. Primary Steel, Inc.*, No. 88-2267 (8th Cir. July 17, 1989).

[13] *NITL—Pet. to Inst. Rule on Negotiated Motor Car. Rates*, 5 I.C.C.2d 623 (1989).

[14] Docketed as No. MC-C-30090, *National Industrial Transportation League—Petition for a Declaratory Order on Negotiated Motor Common Carrier Rates.*

has arisen. One petitioner was penalized by a Minnesota Bankruptcy Court for commencing an action with the Commission without the Court's permission.[15] As a result of that ruling, a number of petitioners have moved to withdraw their petitions before the Commission, while others have requested the Commission to hold their proceedings in abeyance, pending resolution of an appeal of the Minnesota ruling.

The courts have requested the Commission to consider other reasonable practice issues involving filed tariffs. In one case involving application of the Commission's credit regulations, the Commission found that the retroactive application by Campbell 66 Express, Inc., of a "loss of discount" tariff provision, in an effort to collect undercharges, was an unreasonable practice.[16]

Also in connection with the credit regulations, the Commission authorized the collection, by tariff rule, of straight liquidated damages or additional charges through loss-of-discount rates to recoup collection fees[17] and clarified the credit regulations.[18] Shippers were concerned about tariff rules containing an absolute obligation to pay despite clear errors in freight bills. The Commission advised that when there is an error of a clerical nature on the face of a freight bill, the shippers may correct the error, pay the correct amount, and remain entitled to any applicable discount. The Commission stressed that all types of clerical errors are encompassed in the provisions of 49 CFR 1320.2(g)(iv).

The Commission further amended the credit regulations to require notice of imposition of collection expenses charges to a shipper within 90 days after the authorized credit period.[19] This modification was to protect a shipper from extensive charges covering a period of time during which it received no notice that its payments were arriving late. The amendment also requires carriers to inform shippers of any late payment penalties.[20] The Commission believed that shippers were entitled to a warning that they would lose their freight discounts if they failed to pay their bills on time.

The Commission denied a petition by the Household Goods Carriers' Bureau, Inc., proposing that the Commission further amend the credit regulations by adopting certain uniform penalty charge provisions.[21] The Commission pointed out that, except in the area of non-binding estimates provisions, the penalty charge rules adopted in 1988 apply to household goods carriers. (See the "Household Goods" section for a further discussion of this case.)

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[15] *Transportation Systems International, Inc. v. Honeywell, Inc.*, Adv. No. 4-89-289 (Bankr. D. Minn. July 26, 1989).

[16] No. MC-C-30135, *The Mennen Company v. Campbell 66 Express Inc., and Delta Traffic Service, Inc.* (not printed), served September 6, 1989. The findings in this case have been applied to other cases in which Campbell 66 has sought to collect undercharges on similar grounds.

[17] *Payment of Rates & Charges – Penalty for Nonpayment*, 4 I.C.C.2d 340 (1988).

[18] *Payment of Rates & Charges – Penalty for Nonpayment*, 5 I.C.C.2d 88 (1988).

[19] *Payment of Rates & Charges – Penalty for Nonpayment*, 5 I.C.C.2d 691 (1989).

[20] 49 CFR 1320.3(c).

[21] Ex Parte No. MC-191, *Petition for Rulemaking – Penalty Charges for Nonpayment of Freight Bills – Household Goods Carriers* (not printed), served April 10, 1989.

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In the area of joint rates, the Commission instituted a proceeding to consider whether it has jurisdiction to regulate detention charges assessed in Puerto Rico according to joint water-motor tariffs filed under 49 U.S.C. 10703(a)(4)(A).[22] The issue arose in the context of a complaint filed by an assignee against a carrier participating in such a tariff. The complaint raises threshold jurisdictional issues involving Puerto Rico's status under the Interstate Commerce Act. The proceeding was pending as the fiscal year closed.

In the area of "released rates," the Commission considered the complaint of two shippers' conferences challenging the lawfulness of certain tariff provisions published by 10 motor carriers.[23] Complainants challenged the lawfulness of an "inadvertence clause" that applies the lowest released value specified in a tariff if the shipper fails to declare one of the higher released values at the time of a shipment. The Commission dismissed the complaint, citing the virtually unbroken string of decisions upholding the legality of inadver-

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[16] No. MC-C-30135, *The Mennen Company v. Campbell 66 Express Inc., and Delta Traffic Service, Inc.* (not printed), served September 6, 1989. The findings in this case have been applied to other cases in which Campbell 66 has sought to collect undercharges on similar grounds.

[17] *Payment of Rates & Charges – Penalty for Nonpayment*, 4 I.C.C.2d 340 (1988).

[18] *Payment of Rates & Charges – Penalty for Nonpayment*, 5 I.C.C.2d 88 (1988).

[19] *Payment of Rates & Charges – Penalty for Nonpayment*, 5 I.C.C.2d 691 (1989).

[20] 49 CFR 1320.3(c).

[21] Ex Parte No. MC-191, *Petition for Rulemaking – Penalty Charges for Nonpayment of Freight Bills – Household Goods Carriers* (not printed), served April 10, 1989.

[22] No. MC-C-30098, *Puerto Rico Freight System, Inc. v. Trailer Marine Transport Corporation* (not printed), served May 4, 1989.

[23] No. MC-C-30102, *National Small Shipments Traffic Conference, Inc., and Drug and Toilet Preparation Traffic Conference, Inc. v. Consolidated Freightways Corporation of Delaware, et al.* (not printed), served January 23, 1989.

tence clauses in similar tariffs. The Commission noted that an inadvertence clause preserves the rights of both the carrier and the shipper under a released rates tariff and in no way eliminates the shipper's right to declare a shipment's value for liability purposes.

The Commission also denied two released rate applications in which household goods carriers and forwarders sought to amend prior released rate orders by adding a requirement that shippers who include articles of extraordinary value in household goods shipments separately identify and list those articles.[24] The Commission determined that the proposed modifications of the subject released rate orders would require substantive changes in regulations and, therefore, notice and the opportunity for public comment. The Commission indicated that it would, in the future, institute a rulemaking to address the questions and issues raised in the applications.

On petition by the Regular Common Carrier Conference, the Commission instituted a declaratory order proceeding to address the lawfulness of certain range of discount tariffs and the use in tariffs of identifying codes rather than shipper names.[25] A petitioner had alleged that range of discount tariffs are unlawful in failing to contain the actual rates to be charged or to provide an objective methodology for determining the rates. The proceeding was pending as the fiscal year closed.

In an investigation and suspension proceeding,[26] the Commission sus pended certain tariff schedules that attempted to incorporate the Commission's negotiated rates policy. The Commission instituted an investigation focusing on the lawfulness of the provision which stated that negotiated rates or discounts, once agreed upon, will be applicable even though not timely filed in tariffs.

Also during the fiscal year, the Commission reconsidered a challenge to a tariff provision published by United Parcel Service, Inc., limiting the service that carrier held out by excluding the transportation of common fireworks.[27] The Commission reversed the decision it had entered in fiscal year 1988 and found the tariff provision not to be unreasonably discriminatory or otherwise unlawful. (See the "Operating Rights" section of this chapter for a further discussion of this case.)

Rate Bureaus

During fiscal year 1989, the Commission continued its processing of collective ratemaking agreements under 49 U.S.C. 10706, as amended by Section 14 of the Motor Carrier Act. Significant progress was made toward completing review of the agreements. As a result, the Commission: (1) provisionally approved, subject to further changes, agreements filed by eight rate bureaus; (2) continued provisional approval, subject to further changes, of agreements filed by three rate bureaus; (3) revoked the antitrust immunity of six rate bureaus; (4) modified the conditions previously imposed for approval of the collective ratemaking agreement of one rate bureau; and (5) granted final approval of agreements filed by eight rate bureaus.

In a significant decision in this area,[28] the Commission found that the

[24] Released Rates Application No. MC-1541 and Released Rates Application No. FF-461, *Articles of Extraordinary Value* (not printed), served May 31, 1989.

[25] No. MC-C-30117, *Regular Common Carrier Conference—Petition for Declaratory Order—Range of Discounts and Customer Account Codes* (not printed), served November 9, 1988.

[26] Investigation and Suspension Docket No. M-30419, *Consolidated Freightways Corporation—Negotiated Rates Provisions* (not printed), served July 12, 1989.

[27] *B.J. Alan Co., et al. v. United Parcel Service, et al.*, 5 I.C.C.2d 700 (1989), reversing the prior decision at 4 I.C.C.2d 704 (1988).

[28] *Machinery Haulers Association*, 5 I.C.C.2d 808 (1989).

Machinery Haulers Association had continuously and persistently engaged in unlawful activities and had submitted a revised agreement that ignored applicable legal requirements and the Commission's many decisions interpreting those requirements. The Commission also found that the bureau had consistently demonstrated an inability or unwillingness to comply with the law and that it had shown that it lacks the necessary commitment to achieve an acceptable level of compliance. The Commission denied the bureau's application for approval of its revised rate bureau agreement, revoked the bureau's antitrust immunity, and ordered all the bureau tariffs canceled. This decision was subsequently stayed to allow the Association an opportunity to demonstrate its intention to achieve compliance in the future.

In two proceedings, the Commission approved minor amendments to rate bureau agreements. In one of those proceedings, it authorized a bureau to enter into joint agency agreements, including joint tariff publishing arrangements, with similar organizations or other common carriers of property.[29] In the other proceeding, it authorized a bureau's Commission on Division of Interline Revenues to discuss matters pertaining to division of interline revenues between carriers and to make recommendations to its General Rate Committee.[30]

The Commission also approved the merger of one rate bureau into another, together with a minor territorial amendment to the bylaws of the remaining bureau.[31]

In another proceeding, the Commission decided to investigate the reasonableness of a collectively formulated 4.8-percent, general increase proposal and to review the lawfulness of independent actions in the same amount as collectively discussed proposals.[32]

Operating Rights

The Commission's operating rights policies and licensing practices reflected its continuing commitment both to simplify the licensing process and to do its part to aid highway safety. By eliminating unnecessary barriers to entry, carefully monitoring carriers' safety records, and encouraging new and expanded motor carrier operations, the Commission's operating rights activity enhanced the quantity and quality of trucking service in the public interest.

Common carrier authorities issued under the Commission's simplified and expedited licensing procedures continue to provide for the transportation of general commodities, with the usual exceptions,[33] or other broad classifications, nationwide or in a sizable region of the country. Contract carrier authorities, similarly, are generally issued in terms of nationwide service for all shippers or receivers of the authorized commodities. The Commission's service authorizations are predicated on an applicant's fitness, willingness, and ability to provide the proposed service, and evidence that applicable statutory and

[29] Section 5a Application No. 48 (Amendment No. 9), *Eastern Central Motor Carriers Association, Inc.—Agreement* (not printed), served January 5, 1989.

[30] Section 5a Application No. 9, *National Bus Traffic Association, Inc.—Agreement* (not printed), served April 7, 1989.

[31] Section 5a Application No. 46, *Southern Motor Carriers Rate Conference, Inc., and Central and Southern Motor Freight Tariff Association, Inc.—Merger Agreement* (not printed), served March 24, 1989.

[32] No. 40212, *General Increase, RMMTB, February 27, 1989* (not printed), served March 6, 1989, reconsideration denied by decision served June 1, 1989.

[33] Classes A and B explosives, household goods, and commodities in bulk.

administrative requirements will be observed.[34] In the area of common carriage, the Commission will grant authority if it finds that the proposed operations will serve a useful public purpose, responsive to a public demand or need, unless it finds that the proposed service will be inconsistent with public convenience and necessity.[35] In the area of contract carriage, the Commission will grant authority if it finds that the proposed service will be consistent with the public interest and the national transportation policy.[36]

The Commission has proposed, by rulemaking, to revise and consolidate the standard operating rights application form (Form OP-I) and the application form for emergency temporary (ETA) and temporary (TA) operating authority (Form OCCA-95).[37] The rulemaking embraces corresponding revisions to the Commission's rules governing applications for permanent operating authority,[38] emergency temporary authority and temporary authority,[39] and the list of forms.[40] The proposed form and rule revisions are intended to simplify and unify the licensing application process, minimize the application filing burdens on applicants, and, in turn, create a more streamlined and efficient application process for the public, as well as the Commission. These overall simplification goals are intended to reflect the fact that the Commission's licensing responsibilities now occur largely on the basis of an un protested docket. Accordingly, the licensing form and administrative procedures are proposed to be refocused on essential issues relating to an applicant's fitness to receive authority (e.g., safety and insurance compliance) and general responsiveness of service proposals to the public interest. At the conclusion of the fiscal year, the Commission was evaluating comments received in response to its notice.

In another proceeding,[41] the Commission adopted final rules consolidating administrative interpretations and routing provisions[42] into a central location in the Code of Federal Regulations.[43] The consolidated regulations cover the interpretation of operating rights provisions concerning the return transportation of containers and other shipping devices, authority implied in grants to serve particular municipalities and unincorporated communities, and incidental for-hire transportation by private motor carriers. They also embrace routing regulations concerning such areas as misrouting of traffic, authority to operate in traversal states, and the motor passenger carrier one-airline-mile-corridor rule. Finally, they cover administrative interpretations concerning gifts, donations, and hospitality by carriers to shippers.

The Commission considered a challenge to a tariff provision published by United Parcel Service, Inc., limiting the service that carrier held out by excluding the transportation of common fireworks.[44] The Commission reversed its prior decision and found the tariff provision not to be unreasonably dis-

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[33] Classes A and B explosives, household goods, and commodities in bulk.

[34] *See* 49 U.S.C. 10922(b)(1) and 10923(a)(1).

[35] *See* 49 U.S.C. 10922(b)(1).

[36] *See* 49 U.S.C. 10923(a)(2).

[37] Ex Parte No. 55 (Sub-No. 69), *Rules Governing Applications for Operating Authority – Revision of Form OP-1*, (not printed), (served May 12, 1989), 54 Fed. Reg. 20879 (May 15, 1989).

[38] 49 CFR Parts 1160 and 1168.

[39] 49 CFR Part 1162.

[40] 49 CFR Part 1003.

[41] Ex Parte No. 55 (Sub-No. 67), *Interpretations and Routing Regulations*, 5 I.C.C.2d 83 (1988), modified at 5 I.C.C.2d 522 (1989).

[42] Formerly at 49 CFR Parts 1004, 1041, and 1042.

[43] 49 CFR Part 1004.

[44] *B. J. Alan Co., et al. v. United Parcel Service, et al.*, 5 I.C.C.2d 700 (1989), reversing the prior decision at 4 I.C.C.2d 704 (1988).

criminatory or otherwise unlawful. It concluded that the prior decision's treatment of the case as a traditional discrimination case was erroneous. It then analyzed the record in terms of the common carrier obligation and found the carrier's decision to terminate its participation in transporting common fireworks to be justified, due to the difficulty and expense in complying with the proliferation of non-uniform state and municipal regulations governing fireworks; the operational impracticality of transporting common fireworks in the scheme of the carrier's overall business plan; and the economic impracticality and injury to the carrier's public image in being subject to defending itself against adverse publicity and possible lawsuits stemming from the use of common fireworks it had delivered. The Commission noted that alternative services were available to fireworks shippers, albeit at higher costs reflecting the transportation burdens associated with these commodities.

The Commission further considered the recurring issue of whether shipments of commodities within a single state after an interstate movement remain in interstate commerce.[45] The Commission found that certain shipments of bulk cement by water from Mexico to a storage facility at Richmond, California, came to rest at Richmond. Consequently, all subsequent movements from Richmond to other points in California were movements in intrastate commerce. Since there was no specific arrangement between the cement importer and the customer, there was no single shipper (or even joint shippers) with a fixed and persisting intent from the outset to have one continuing shipment of goods in foreign commerce. In another proceeding, the Commission emphasized the importance of specific testimony from a shipper to determine whether that shipper has a fixed and persisting intent that its shipments move in continuous interstate or foreign commerce.[46] The Commission was able to determine that certain movements of petroleum within a single state arranged by the U.S. Department of Defense were parts of continuous movements in interstate commerce. Insufficient evidence of shipper intent prevented such a finding for other shipments.

The Commission also overruled an earlier precedent [47] and found that a determination of whether a particular single-state movement by motor carrier is interstate or intrastate does not depend upon the transportation mode by which the involved traffic crosses the state line.[48] Consequently, the fact that a shipment may enter a state in a transportation mode that is exempt from economic regulation does not preclude the Commission's regulation of further motor carrier transportation of that shipment, in interstate or foreign commerce, within a single state.

In a related area, the Commission considered the status of less-than-truckload property shipments transported between points in the same state, through a carrier's operating terminal in another state.[49] In response to a complaint filed by a state regulatory body, the Commission found that such operations were interstate in nature and not a subterfuge or bad faith attempt to avoid state regulation. In making this de-

[45] No. MC-C-30121, *Pacific Coast Building Products, Inc. – Petition for Declaratory Order* (not printed), served January 13, 1989.

[46] No. MC-C-30065, *Bigbee Transportation, Inc. – Transportation within Alabama, Mississippi and Georgia – Petition for Declaratory Order* (not printed), served November 1, 1988.

[47] *Behnken Truck Service, Inc., Ext. – Exbarge Traffic*, 103 M.C.C. 787 (1967).

[48] No. MC-C-30002, *Victoria Terminal Enterprises, Inc. – Transportation of Fertilizer within Texas – Petition for Declaratory Order* (not printed), served February 3, 1989.

[49] No. MC-C-30092, *Michigan Public Service Commission v. Hover Trucking Company of Michigan* (not printed), served March 13, 1989.

termination, the Commission thoroughly examined the degree of circuity involved in the routing, the operational justification for the routing, and the relationship of the traffic to the carrier's overall operations.

The Commission also instituted a similar proceeding in response to a carrier's petition seeking a declaratory order to determine whether the transportation of certain property shipments by motor vehicle, between various points in one state, was in interstate commerce.[50] Two categories of shipments appeared to be involved including shipments moved between points in one state through another state and pool distribution traffic and warehouse traffic that a petitioner had transported within one state, subsequent to movements from out-of-state origins. The proceeding was pending as the fiscal year closed.

In a significant case in the contract carrier area, the Commission determined the proper form for granting household goods contract carrier operating authority to provide industrywide service.[51] (See the "Household Goods" section of this chapter for further discussion.) The Commission granted contract carrier authority to 157 applicants in this proceeding. In a subsequent proceeding,[52] the Commission applied its announced evidentiary standards and granted household goods contract carrier authority to an additional 36 applicants.

As the fiscal year closed, the Commission continued to consider public comments that had been submitted in response to its earlier proposal to expand the territorial scope of commercial zones and terminal areas.[53]

Insurance

During fiscal year 1989, the Commission continued its efforts to provide protection to the public by strictly enforcing its financial responsibility requirements. These regulations require all motor common and contract carriers, property brokers, and freight forwarders authorized to engage in transportation in interstate or foreign commerce to have on file with the Commission—and maintain on a continuous basis—certificates of insurance or other evidence of security at the prescribed minimum limits of liability.[54] The operating rights of these entities remain in effect only as long as they satisfy the Commission's insurance requirements. Entities failing to comply with the financial responsibility regulations are prohibited from operating under the authorities issued to them and their operating authorities are subject to the Commission's revocation proceedings.

During the year, the Commission received a total of 87,290 insurance filings representing an increase of nearly 6 percent over the number received during fiscal year 1988. These filings include new and replacement certificates of insurance, surety bonds, trust fund agreements, and approximately 34,500 notices of cancellation. Where evidence of replacement insurance was not timely filed with the Commission following receipt of cancellation notices, revocation proceedings were initiated to revoke carrier operating authorities. In this regard, over 37,000 Commission orders were issued including orders discontinuing revocation proceedings when carriers attained compliance with the insurance requirements. There were 4,050 revocation actions against operating

[50] No. MC-C-30129, *Pittsburgh-Johnstown-Altoona Express, Inc.—Petition for Declaratory Order* (not printed), served January 10, 1989.

[51] *Interstate Van Lines, Inc., Extension—Household Goods*, 5 I.C.C.2d 168 (1988).

[52] No. MC-1656 (Sub-No. 2), *Ralph Ferrara, Inc., Extension—48 States—Contract Carriage* (not printed), served April 26, 1989.

[53] Ex Parte No. 37 (Sub-No. 40), *Commercial Zones and Terminal Areas* (not printed), served April 26, 1987.

[54] 49 U.S.C. 10927.

authorities of motor carriers and licenses of brokers for failure to comply with the security requirements, and 299 carrier and broker entities requested voluntary revocation of their authority.

The Commission continued to review applications filed by motor carriers for authority to self-insure their bodily injury and property damage and/or cargo insurance. During the year, the Commission authorized eight carriers to self-insure. Further, to make certain that self-insured carriers were continuing to provide adequate protection to the public, the Commission monitored carrier safety records, financial statements, and performance with respect to the handling of loss and damage claims.

Safety

Motor carrier safety continues to be a primary concern when the Commission evaluates the fitness of an applicant for new or expanded authority. Consistent with the intent of the Motor Carrier Safety Act of 1984,[55] the Commission continued its efforts to identify motor carriers with questionable safety records and to scrutinize the safety profiles of applicants seeking authority.

During the year, the Commission adopted a new policy governing submission and evaluation of safety fitness evidence in motor carrier licensing proceedings.[56] To eliminate confusion, streamline its internal process, and expedite final decisions, the Commission moved its examination of fitness to the beginning of the application process. It placed the burden on applicants, at the time of filing, to inform the Commission of their current safety ratings as assigned by the U.S. Department of Transportation (DOT). It advised potential applicants that: (1) all applications filed by carriers holding unsatisfactory safety ratings would be rejected;[57] (2) all applications seeking authority to transport passengers or hazardous materials filed by conditional-rated carriers would be rejected; and (3) all other applications filed by carriers with conditional ratings would be reviewed on a case-by-case basis and either approved, subject to a one-year term limitation, or denied. Rejections would be made without prejudice to applicants' refiling after they have obtained upgraded safety ratings. Decisions in proceedings involving conditional-rated, non-hazardous property carriers would be based on required evidence that applicants have taken steps to correct all safety deficiencies, achieved full compliance with DOT requirements, and requested a new safety audit.

Under prior and new (beginning in December 1988) policy standards, the Commission processed approximately 600 licensing cases involving questionable safety fitness in fiscal year 1989. During the period, the Commission denied 28 applications of applicants holding unsatisfactory ratings and also rejected 28 applications filed by conditionally-rated applicants. The Commission also denied 48 applications of conditional-rated applicants and rejected 236 other applications.

In a number of instances in which applicants for authority held conditional safety ratings—an indication of DOT's willingness to accord such carriers the opportunity to improve their safety compliance records—the Commission granted the authority sought, subject to a one-year term limitation. During the past fiscal year, the Commission granted 110 one-year, limited-term certificates and permits to carriers holding conditional safety ratings. Such limited-

[55] P.L. No. 98-554 (October 11, 1984).

[56] *Safety Fitness Evidence—Licensing Procedures*, 5 I.C.C.2d 94 (1988).

[57] In the past, the Commission either denied these applications or granted them but withheld the actual issuance of any authority until DOT upgraded the applicants' safety ratings. Rejection will allow return of the filing fee.

term authority was issued with the understanding that the involved operating rights would expire at the conclusion of the term unless the carrier had received a satisfactory safety rating by that time. During the year, the Commission denied the requests of 14 carriers for an extension of the limited term. It granted unrestricted authority to 120 applicants upon a showing that their ratings had improved to satisfactory. The Commission also granted extensions of limited-term authorities in seven proceedings involving carriers that continued to hold conditional safety ratings when circumstances warranted additional time to permit the carriers to receive new DOT ratings.

The Commission also continued to treat safety fitness as a substantive issue for consideration in determining whether to approve transfers under 49 U.S.C. 10926 and to grant exemptions under 49 U.S.C. 11343(e) for the purchase or merger of motor carrier authority. During fiscal year 1989, the Commission considered a number of proceedings in which either the transferor or the transferee held less than a satisfactory rating. Where a conditional safety rating was involved, the Commission granted three conditional, one-year approvals and denied or rejected 24 petitions or applications. The Commission approved five transactions upon a showing that the involved safety rating had improved from conditional to satisfactory. Where an unsatisfactory safety rating was involved, the Commission denied or rejected 11 petitions or applications. (*See* the "Mergers and Unifications" section, above, for additional discussion of the Commission's policy in this area.)

In view of several carriers' histories of unsafe motor carrier operations, the Commission instituted investigations with a view toward compelling compliance with pertinent statutory and regulatory requirements of the Commission and DOT or revoking existing authority.[58] In one proceeding, the Commission revoked two carriers' operating authorities in light of unrebutted evidence showing significant safety violations and unlawful operations.[59]

Foreign Carriers

A statutory licensing moratorium prohibiting the Commission from issuing authority to carriers domiciled in Mexico, or owned or controlled by Mexicans, remained in effect during the past fiscal year, as did President Reagan's order lifting the moratorium on Canadian motor carriers.[60] As a result, the Commission continued to observe procedures to enforce the licensing moratorium on Mexican domiciled, owned, or controlled applicants for operating authority.[61]

The Commission also continued to issue foreign carrier certificates of registration to Mexican domiciled or controlled carriers seeking to transport exempt commodities or to provide private carriage services in the United States.[62] The Commission, however, proposed [63] to modify its regulations and application procedures to conform to new statutory requirements changing the scope and duration of certificates of registration

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[58] See, e.g., No. MC-C-30160, *M. Bulfant Trucking, Inc. – Investigation and Revocation of Certificate* (not printed), served May 1, 1989.

[59] No. MC-C-30125, *Mill Basin Transit, Inc., and Rapid Express Coach, Inc. – Investigation and Revocation* (not printed), served September 22, 1989.

[60] *See* 49 U.S.C. 10922(*l*). The moratorium had been extended with respect to Mexican carriers during September 1988.

[61] Ex Parte No. 55 (Sub-No. 43D), *Certification of Canadian or Mexican Ownership or Control of Applicants for Motor Common or Contract Authority*, 47 Fed. Reg. 42948 (September 29, 1982).

[62] *See* 49 U.S.C. 10530.

[63] Ex Parte No. 55 (Sub-No. 74A), *Applications for Certificates of Registration for Certain Foreign Carriers* (not printed), served June 9, 1989.

and authorizing potential changes in insurance requirements.[64]

Under the new statute, foreign carriers do not have to renew their certificates of registration annually. Carriers operating under lease arrangements, however, are no longer exempted, and the exemption for for-hire carriers of regulated commodities has been eliminated. Changes to the insurance requirement for certificates of registration resulted in motor foreign private carriers' of non-hazardous commodities having to maintain the same amount of insurance as the for-hire foreign motor carriers (the same level as required of all United States interstate carriers). Also, the U.S. Department of Transportation (DOT) is now permitted by statute to amend its regulations to allow carriers subject to the certificate of registration requirement to meet insurance requirements only during periods of operation in the United States, *i.e.*, on a trip basis. If the DOT does not adopt regulations providing for trip insurance, the Commission's current continuous coverage requirement will remain in effect. The statute requires that the Commission put final rules into effect by January 1, 1990. The Commission's proceeding was pending at the end of the fiscal year.

Household Goods

Prior to the beginning of fiscal year 1989, the Commission reopened 208 related application proceedings concerning household goods contract carriers as a result of a decision by the U.S. Court of Appeals for the District of Columbia Circuit.[65] The court had reversed and remanded to the Commission a decision in which the Commission had authorized the transportation of household goods for the class of shippers identified as "persons (except individuals) as defined in 1 U.S.C. 1". The court had held that the permit granted by the ICC did not specify the class of shippers to be served with the precision necessary to ensure that an applicant would serve only shippers with distinct needs, and thereby did not ensure that the applicant would function only as a motor contract carrier.[66]

During fiscal year 1989, the Commission considered the applications of carriers that had expressed a continuing interest in gaining household goods contract carrier authority. The Commission resolved the remaining 159 cases in the consolidated *Interstate* proceeding,[67] in which it defined the class of household goods shippers that have "distinct needs" and clarified the requirements of service through "assignment of motor vehicles."[68] The Commission's decision granted the contract carrier applications of 157 applicants that proposed to provide services designed to meet the distinct needs of members of the defined class; and/or dedicate equipment to the exclusive use of commercial shippers. In addition, 61 household goods contract carriers whose application proceedings had been held open subsequent to the court's decision were afforded the opportunity to submit supplemental evidence in light of the Commission's findings.

Subsequently, the Commission resolved 58 cases in a consolidated proceeding[69] by applying the evidentiary standards enunciated in *Interstate* and granting the applications of 36 carriers that proposed to provide services

[64] Congress modified the law in the Truck and Bus Safety and Regulatory Reform Act of 1988, enacted as Title IX, Subtitle B, of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

[65] *Global Van Lines, Inc. v. ICC*, 804 F.2d 1293 (D.C. Cir. 1986).

[66] *See* 49 U.S.C. 10923(d)(2) and 49 U.S.C. 10102(15)(B)(ii).

[67] *Interstate Van Lines, Inc., Extension—Household Goods*, 5 I.C.C.2d 168 (1988).

[68] *See* 49 U.S.C. 10102(15)(B).

[69] No. MC-1656 (Sub-No. 2), *Ralph Ferrara, Inc., Extension—48 States—Contract Carriage* (not printed), served April 26, 1989.

designed to meet the distinct needs of members of the class of shippers defined in *Interstate;* and/or dedicate equipment to the exclusive use of commercial shippers. The ICC's decision also held open for additional evidence the applications of four carriers that held "conditional" safety ratings from the DOT. The Commission's decision denied the applications of 18 carriers that had failed to respond to either of two ICC decisions that had held open their application proceedings for the submission of supplemental evidence.

After entering its decision in *Interstate,* the Commission granted numerous applicants household goods contract carrier authority under the guidelines set forth in that decision.[70] The large majority of the applications were unopposed.

The Commission approved and authorized the pooling of services by household goods carrier Wheaton Van Lines, Inc., and its carrier-agents.[71] Under the statute, the Commission is required to approve such pooling agreements without a hearing unless it determines that the proposed agreement is of major transportation importance or that there is a substantial likelihood that the agreement will unreasonably restrain competition.[72] The Commission determined that the Wheaton pooling agreement was not a matter of major transportation importance because the carrier-agents involved were all small carriers and the nature of the household goods transportation industry is such that there are a large number of competing carriers. The Commission similarly found that it would be unlikely that the agreement would unduly restrain competition because the practices proposed in the pooling agreement are the same or similar to existing practices in the industry. The Commission noted that the chief competitive concern was not a diminution of competition between Wheaton and its agents, but the viability of competition between Wheaton and other major household goods carriers. The Commission also authorized a simplified procedure for adding new carrier-agents to the pooling agreement in the future.

Near the end of fiscal year 1988, the Household Goods Carriers' Bureau, Inc., requested that the Commission institute a rulemaking proceeding for the purpose of promulgating rules that would allow moving van companies to assess certain specified collection or penalty charges against household goods shippers who fail to pay their freight bills on time. The Bureau contended that the Commission's recently adopted credit rules covering penalty charges for nonpayment of freight bills did not apply to motor common carriers of household goods.[73] The Commission denied the petition,[74] pointing out that, except with regard to collect-on-delivery (C.O.D) shippers subject to non-binding estimates, the new penalty charge rules are applicable.[75] The Commission advised the Bureau that efforts to impose penalty provisions on C.O.D. shipments would be improper.

During the fiscal year, the Commission adopted a final rule governing the payment of proportional freight charges

[70] *See, e.g.,* No. MC-212924, *Joseph A. Poff, d/b/a Durham Transfer, Contract Carrier Application* (not printed), served July 13, 1989; No. MC-215043, *Patrick B. McKay, d/b/a Moving Services, Unlimited, Contract Carrier Application* (not printed), served May 16, 1989; and No. MC-214186(P), *Royal Moving & Storage (1984), Ltd., Contract Carrier Application* (not printed), served April 10, 1989.

[71] No. MC-F-19309, *Wheaton Van Lines, Inc., et al. – Pooling Application* (not printed), served January 23, 1989.

[72] 49 U.S.C. 11342(b)(1).

[73] The new credit rules were adopted in *Payment of Rates & Charges – Penalty for Nonpayment,* 4 I.C.C.2d 340 (1988).

[74] Ex Parte No. MC-191, *Petition for Rulemaking – Penalty Charges for Nonpayment of Freight Bills – Household Goods Carriers* (not printed), served April 10, 1989.

[75] *See* 49 CFR 1320.8(a) and 1056.3(d).

on lost or destroyed household goods.[76] The revised rule requires moving van companies to refund proportional freight charges on shipments that are less than totally lost or destroyed in transit. The refund is to be given at the time the corresponding loss and damage claims are processed. The rule change was designed to eliminate difficulties the moving industry had experienced in complying with a prior ICC rule and, at the same time, to ensure that shippers will be refunded appropriate tariff charges for articles lost or destroyed in transit.

Prior to the beginning of the fiscal year, the Commission had instituted a declaratory order proceeding to review the broad question of the lawfulness of those household goods discount tariffs that contain a range of discounts. The Commission also wanted to consider the effect of binding estimate authority on the lawfulness of such tariffs.[77] As the fiscal year closed, the matter was pending before the Commission.

The number of complaints received against household goods carriers during fiscal year 1989 increased by 11 percent over those received the previous fiscal year. Fiscal year 1988 was a record-low year for household goods complaints received since passage of the Household Goods Transportation Act of 1980. This year's data represent the third lowest year for the number of complaints received since passage of the Act.

The Independent Trucker

The individual truck owners who operate their vehicles in performing transportation under lease to Commission-authorized motor carriers continued to be an important segment of the trucking industry. This fiscal year, the ICC's Office of Compliance and Consumer Assistance and Office of Public Assistance continued to provide advice to owner-operators concerning regulatory requirements. In addition, the Commission's staff assisted owner-operators by handling complaints they had against motor carriers, principally with respect to delayed and disputed payments for line haul transportation services. In this regard, the Commission helped owner-operators recover over $340,000 in settlements from motor carriers.

During the year, 75 operating authorities were granted to owner-operators under the fitness-only standards established by the Motor Carrier Act as a means of enabling these independent entrepreneurs to more readily obtain carrier status. However, most new carrier entrants, including owner-operators, sought expanded operating authority broader than the fitness-only authority initially granted to them.

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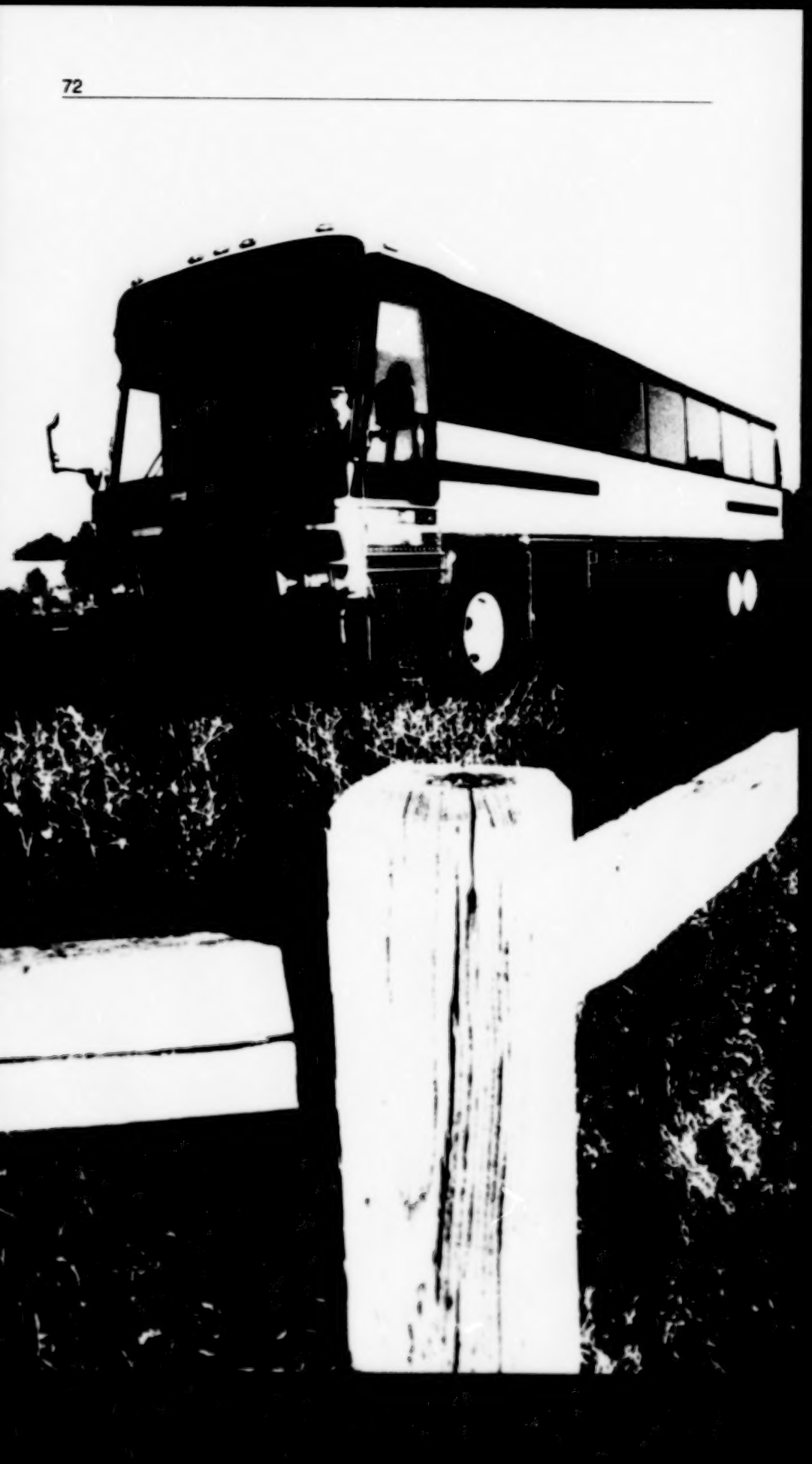
[76] *HHG Carriers – Proportional Freight Charges*, 5 I.C.C.2d 836 (1989), revising the rules at 49 CFR 1056.15.

[77] No. MC-C-30029, *Andrews Van Lines, Inc., et al. – Petition for Declaratory Order* (not printed), served July 20, 1987.



BUS COMPANIES

General Financial Condition

Greyhound Lines, Inc. is the predominant carrier in the intercity bus industry, and the scope of its operations substantially increased in July 1987 when it acquired the operations of Trailways Lines, Inc. Greyhound now accounts for about 75 percent of the revenues generated by the 33 Class I intercity bus companies, based upon 1988 revenues.

A substantial improvement in earnings was reported by Greyhound in fiscal year 1989, the second year of operations subsequent to its 1987 acquisition of Trailways. Net income for fiscal year 1989—October 1, 1988 to September 30, 1989—was $3.9 million, compared to an $8.6 million loss for fiscal year 1988. During these periods, net carrier operating income rose 66.2 percent to $59.3 million. Net income was substantially less than net carrier operating income as a result of interest expense incurred by Greyhound in connection with its acquisition of Trailways. Operating revenues rose about 10 percent as revenue passengers carried increased.

The Greyhound-Trailways merger appears to have had a substantially favorable impact on Greyhound's operations, although it is still too soon after the merger to draw any definitive conclusions.

Rates and Operating Rights

During fiscal year 1989, the Commission considered 779 motor carrier applications requesting authority to transport passengers. Of these, the Commission granted 767 and denied 12.

Most of the common carrier applicants sought authority to conduct charter and special operations, and the remainder sought authority to provide scheduled operations over specified routes. Under state preemption provisions,[1] many applicants for regular-route authority requested intrastate authority on the routes over which interstate authority also was requested. Under the law, intrastate passenger authority granted according to the preemption provision is subject to a condition that a carrier provide regularly scheduled interstate service on the route.[2] The legislative history of the law indicates that the involved interstate service must be substantial and *bona fide* and must involve actual service in more than one state. However, the interstate and intrastate services need not be identical, nor must they be provided in the same vehicle.

This fiscal year, the Commission decided several cases involving these requirements. In one case, the Commission concluded that an applicant had failed to demonstrate that it would conduct a *bona fide* interstate operation over its proposed route.[3] Since the Commission could not grant interstate authority, it found that it had no jurisdiction to consider the proposed intrastate service, and thus denied the application in its entirety. In another proceeding, the public record supported a finding that an applicant was proposing a substantial, *bona fide* interstate service that involved actual service in more than one state.[4] Accordingly, the Commission authorized both interstate and intrastate regular-route passenger service. In a declaratory order proceeding, the Commission examined a carrier's existing operations and found that the carrier was performing intrastate service in connection with substantial, regularly scheduled, interstate transportation

[1] 49 U.S.C. 10922(c)(2)(B).

[2] 49 U.S.C. 10922(c)(2)(J), enacted in Section 340 of the Surface Transportation and Uniform Relocation Assistance Act of 1987, P.L. No. 100-17, 101 Stat. 132, effective April 2, 1987.

[3] No. MC-213566 (Sub-No. 1), *Michelle Long, d/b/a Strip Transportation Co., Regular-Route Passenger Service* (not printed), served June 9, 1989.

[4] No. MC-201125 (Sub-No. 2), *Princeton Airporter, Inc., Extension—Regular-Route Passenger Service* (not printed), served April 13, 1989.

services.[5] The Commission thus rejected claims by a state regulatory agency that the carrier's interstate operations were unlawful.

Another proceeding involved a state agency's order that a carrier cease providing service between two in-state airports because a state commission did not recognize the Commission's power to grant intrastate operating authority or to permit the joining of route segments.[6] The Commission reaffirmed its power to authorize intrastate passenger transportation—if such transportation is to be provided on a route over which the carrier has been granted or will be granted authority after November 18, 1982—to provide the interstate transportation of passengers.[7] Regarding the issue of the joinder of route segments, the Commission highlighted its power to interpret the boundaries of its own certificates and advised that separate, unrestricted segments of regular-route authority may be joined together so that a carrier may provide "through" transportation service.

Also during the year, one carrier filed a petition under the Commission's procedures[8] for preempting state rate jurisdiction and authorizing intrastate rate increases in situations in which a state has denied, or failed to consider, a carrier's request for such increases.[9] In this case, the Commission found that the Connecticut Department of Transportation had neither issued a timely decision on the carrier's original application, nor filed an answer to a petition for review. As required by the statute, the Commission granted the carrier permission to increase its intrastate fares as proposed.

The Commission additionally considered one petition for review of a state agency's action denying a carrier permission to discontinue regular-route intrastate service over interstate routes.[10] In its decision, the Commission authorized Greyhound Lines, Inc., to discontinue regular-route passenger service, in interstate and in intrastate commerce, over three routes in Kansas.[11] The Commission found that the variable costs of providing the involved services exceeded the revenues derived from them, that patronage along the routes was low, and that no financial assistance had been offered.

In another area, the Commission proposed to revise its regulations in 49 CFR 1054 governing the exercise of "incidental charter rights."[12] As a consequence of the statutory amendments in the Bus Regulatory Reform Act of 1982, very few carriers are using incidental charter rights. The proposed revisions would simplify regulations to eliminate a number of obsolete requirements and to broaden the territorial scope for incidental charter authority to that typically granted in certificates specifically authorizing charter operations, *i.e.*, nationwide authority. This case was pending as the fiscal year closed.

The Commission also reopened a proceeding to restore an exception to the one-airline-mile corridor rule (49 CFR 1004.20) prohibiting motor passenger carriers from providing service beyond authorized regular routes gener-

[5] No. MC-C-30036, *Holland Industries, Inc.—Intrastate Operations—Petition for Declaratory Order* (not printed), served March 8, 1989.

[6] No. MC-C-30151, *Tri-State Coach Lines, Inc.—Petition for Declaratory Order—Intrastate Passenger Transportation* (not printed), served June 1, 1989.

[7] 49 U.S.C. 10922(c)(2)(B).

[8] *See* 49 U.S.C. 11501(e).

[9] No. MC-C-30147, *Peter Pan Bus Lines, Inc., Petition for Review—Connecticut Intrastate Fares* (not printed), served March 7, 1989.

[10] *See* 49 U.S.C. 10935.

[11] No. MC-1515 (Sub-No. 400), *Greyhound Lines, Inc., Exit Petition—Kansas* (not printed), served July 7, 1989, petition for stay denied in decision served July 19, 1989.

[12] Ex Parte No. MC-29 (Sub-No. 5), *Incidental Charter Rights—Simplification of Regulations* (not printed), served June 9, 1989.

ally within the New York metropolitan area.[13]

In a declaratory order proceeding,[14] the Commission determined that certain claimed motor carrier movements of passengers were exempt from Commission regulation under the statutory incidental-to-air exemption.[15] The Commission found that, to the extent the petitioner's ground operations are conducted on a through-ticket basis or according to other common arrangements between the petitioner and various airlines, are prior or subsequent to an interstate air movement, and are within a 25-mile radius of the Seattle-Tacoma International Airport, they are considered to be "continuing" moves in interstate commerce and within the scope of the statutory exemption.

The Commission also dismissed two petitions filed by the National Bus Traffic Association, Inc., which sought a declaration that it would not be discriminatory to add mirrors and cremated human remains to the prohibited articles list in a tariff governing express transportation.[16] The Commission found that, since the additions to the tariff had not been published, the petitions did not present a case or controversy. However, the Commission did note and agree with the petitioner's position that bus express carriers have the right reasonably to limit the types of property they will transport under their express authorizations.

In fiscal year 1988, the Commission had authorized Greyhound Lines, Inc., through its subsidiary, GLI Acquisition Company, to purchase the interstate and intrastate operating rights and principal operating assets of Trailways Lines, Inc., and Trailways' 50-percent stock interest in Continental Panhandle Lines, Inc.[17] During fiscal year 1989, the Commission denied a petition to reopen that proceeding.[18] The Commission held that the petitioner had failed to show the existence of material error in the Commission's earlier decision, the presence of new evidence, or a demonstration of substantially changed circumstances in arguing that the Commission should have imposed protective conditions on the purchase and acquisition transactions it had earlier approved. In a related proceeding, the Commission exempted the merger of GLI into Greyhound from its prior review and approval requirements.[19]

Service

In fiscal year 1989, the Commission received 347 complaints from the public involving motor passenger operations. Of that total, 224 complaints involved passenger services. This figure represented a 31-percent decrease from the number of similar complaints received during fiscal year 1988. The majority of the complaints involved failure to provide scheduled service; delays in providing service in accordance with published operating schedules; service provided by unauthorized

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[13] *Interpretations and Routing Regulations*, 5 I.C.C.2d 83 (1988), reopened at 5 I.C.C.2d 522 (1989).

[14] No. MC-C-30091, *San Juan Air Services, Inc., d/b/a Shuttle Express – Petition for Declaratory Order* (not printed), served November 15, 1988, petition to reopen denied in decision served March 17, 1989.

[15] 49 U.S.C. 10526(a)(8)(A).

[16] No. MC-C-30141, *National Bus Traffic Association, Inc. – Petition for Declaratory Order – Cremated Human Remains*, and embraced proceeding No. MC-C-30142, *National Bus Traffic Association, Inc. – Petition for Declaratory Order – Mirrors* (not printed), served March 24, 1989.

[17] *GLI Acquisition Company – Purchase – Trailway Lines, Inc.*, 4 I.C.C.2d 591 (1988), *aff'd sub nom. Peter Pan Bus Lines, Inc. v. ICC*, Nos. 88-1532, 1556, and 1567 (D.C. Cir. May 8, 1989).

[18] No. MC-F-18505, *GLI Acquisition Company – Purchase – Trailways Lines, Inc.; GLI Acquisition Company – Control – Continental Panhandle Lines, Inc.* (not printed), served October 6, 1988.

[19] No. MC-F-19243, *Greyhound Lines, Inc. – Merger Exemption – GLI Acquisition Company* (not printed), served February 21, 1989.

carriers; and occasional in-transit service failures, such as equipment breakdowns. There were 24 complaints involving passenger carriers' handling of parcels, luggage, and small shipments.

Thirty of the complaints received involved overcharges in connection with rates or charges published in tariffs governing carrier assessments for services provided, and 69 complaints involved dissatisfaction with the carriers' handling and processing of claims.

The Commission continued its program of passenger carrier inspections at tourist attractions and recreational centers during the year to determine carrier compliance with the ICC's insurance and licensing regulations. This program consisted of 16 road checks and resulted in the inspection of 775 passenger vehicles. Most instances of non-compliance discovered were corrected by voluntary discontinuance of service by carriers until operating authority was secured and evidence of insurance was filed with the Commission. In some instances, non-compliance with insurance regulations required enforcement actions in the form of 19 consent agreements, 11 civil injunctions, and a civil contempt action. Other enforcement actions against motor passenger carriers for violations other than insurance resulted in 11 civil injunctions and 7 civil forfeiture actions. In addition, the Commission's monitoring activities included 20 compliance audits of carriers.

FREIGHT FORWARDERS, WATER CARRIERS, PROPERTY BROKERS, AND PIPELINES

Freight Forwarders

In view of the Commission's limited residual jurisdiction in the nonhousehold goods freight forwarding industry, there was little Commission activity in this area during fiscal year 1989. The primary activity remaining under ICC jurisdiction is household goods freight forwarder licensing.

In a significant freight forwarder proceeding, the Commission determined that its negotiated rates policy[1] should be extended to freight forwarders' practices prior to the deregulation of those practices.[2] The Commission found that, because freight forwarders rely on common carriers for the transportation of goods that they forward, and because motor common carrier pricing practices affect their overall costs, it is logical to treat freight forwarders and motor carriers similarly. Considering the facts presented, the Commission determined that the involved forwarder had agreed to handle a shipper's traffic at a freight-all-kinds (FAK) rate, rather than at a generally higher and otherwise applicable machinery rate, and had billed the shipper and accepted payment at the FAK rate. The Commission thus found that it was an unreasonable practice when the forwarder negotiated the FAK rate and billed and accepted payment at that rate, but failed to file the rate.

Water Carriers

Under the law, the Commission has no jurisdiction over ferry transportation unless it makes a specific finding that exercise of its jurisdiction is necessary to carry out the national transportation policy.[3] During the past fiscal year, the Commission considered two cases involving the ferry exemption.

In one court-remanded proceeding, the Commission determined that an applicant's proposed transportation as a water common carrier of passengers, their baggage, and motor vehicles constituted ferry service and that there was no need for the Commission to exercise jurisdiction over that transportation.[4] The Commission further held that the applicant's proposed incidental transportation of general commodities was minimal and therefore permissible as an adjunct to the involved ferry service. It consequently dismissed the application in its entirety. However, in light of the court decision discussed below, and subject to reviewing court approval, the Commission reopened this case for further consideration. It was pending as the fiscal year closed.

Another proceeding began after a reviewing court affirmed in part and remanded in part a Commission decision that had dismissed a water common carrier application on the grounds that the proposed service was an exempt ferry service.[5] In its decision, the court affirmed a grant of temporary authority, but it remanded the exemption decision for further explanation. The court found that the Commission's decision represented a new policy that departed from prior precedent. Recognizing that such a policy change was permissible, the court directed the Commission to explain in detail the basis for its decision. The case was pending at the end of the fiscal year.

The Commission dismissed one water rate bureau's application for approval of its amended rate bureau agreement and revoked the bureau's

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[1] *See NITL Pet. to Inst. Rule on Negotiated Motor Car.*, 3 I.C.C.2d 99 (1986).

[2] MC-C-30056, *Merchant Stor-Dor Freight System v. Otis Elevator Company* (not printed), served October 6, 1988.

[3] 49 U.S.C. 10544(a)(4).

[4] W-271 (Sub-No. 4), *The Bridgeport and Port Jefferson Steamboat Co., Extension—Connecticut and New York Points* (not printed), served January 12, 1989, decision reopening served June 6, 1989.

[5] *Cross-Sound Ferry Services, Inc. v. ICC*, Nos. 88-1455 and 88-1456 (D.C. Cir. April 28, 1989), remanding *Viking Starship, Inc., Common Carrier Application (Montauk, NY)*, 4 I.C.C.2d 634 (1988).

antitrust immunity for collective activities.[6] Responding to an order to show why immunity should not be revoked, the bureau admitted that there was no present or foreseeable need for antitrust immunity for collective ratemaking. The bureau did not object to having its antitrust immunity revoked. However, the bureau requested, and the Commission granted, a waiver of record retention requirements.[7]

Property Brokers

Property brokerage continued to be a significant transportation growth area throughout fiscal year 1989. As a result of relaxed entry standards and licensing procedures brought about by the Motor Carrier Act, the number of brokers has increased. There were more than 6,400 active, authorized brokers as the fiscal year closed. The industry remains highly decentralized and competitive.

During the fiscal year, the Commission granted 2,793 applications for initial or extended broker's licenses. The large majority of applicants sought authority to be brokers of general commodities (except household goods), and their applications were granted upon a showing of their fitness to be brokers and their ability to comply with statutory and administrative requirements.[8] Few applications were opposed.

Last year, the Commission also adopted rules authorizing property brokers to establish trust funds as an alternative security to surety bonds.[9] In response to the new rules, approximately 280 trust fund agreements were filed and accepted in fiscal year 1989.

In one proceeding,[10] the Commission refused to reconsider its rejection of a proposed trust fund agreement that did not comply with governing rules. The agreement required claimants to obtain an arbitration award prior to any trustee payment and removed the trustee from the role of determining, in good faith, the merits of a disputed claim. When it had adopted the rules, the Commission had rejected requirements or conditions to payment other than a "good faith" determination by a trustee that a broker is liable for a claim.

Pipeline Carriers

During the past fiscal year, the Commission handled one dispute involving an interstate pipeline.[11] In 1985 and 1986, Chevron Pipe Line and Chevron U.S.A. (collectively, "Chevron") constructed one of the world's few phosphate slurry pipelines from Chevron's phosphate mine at Vernal, Utah to the Chevron Chemical Company's mill at Rock Springs, Wyoming. Chevron began transporting phosphate slurry in May 1986 but filed no rates with the Commission. The pipeline has excess capacity because it was less costly to construct a larger pipe than a smaller one.

Responding to a complaint filed by the Ashley Creek Phosphate Company—which holds mineral leases from the State of Utah to mine phosphate, although it has not developed these assets and ships no phosphate—Chevron argued that it was not a common carrier because Chevron transported only its own phosphate slurry and did not hold itself out to the public to provide common carrier transportation. Ashley Creek argued that Chevron's failure to publish rates for utilization of excess capacity of the pipeline and

[6] Section 5a Application No. 10, *Waterways Freight Bureau—Agreement* (not printed), served November 18, 1988.

[7] *See* 49 CFR 1253.30 and 1220.5.

[8] *See* 49 U.S.C. 10924(b).

[9] *Property Broker Security for Protection of Public*, 3 I.C.C.2d 916 (1987), and 4 I.C.C.2d 358 (1988), revising the regulations at 49 CFR Part 1043.

[10] MC-185342, *PM Transportation, Inc.* not printed), served November 8, 1988.

[11] The Commission has authority to regulate the transportation by pipeline of commodities other than water, gas or oil.

thereby enable access to the pipeline was unlawful.

The Commission reversed an initial decision of an Administrative Law Judge who had found that Chevron was not required to publish rates but that because Ashley Creek was not yet ready to ship phosphate, the parties should be required to negotiate and return to the Commission within two years with a rate argument. The Commission also required Chevron to file tariff rates with the ICC[12] but found that the rates should be filed immediately. The Administrative Law Judge found that the reasonableness of the rates should be measured under differential pricing concepts used to judge rail rates. Instead, Chevron filed rates without regard to differential pricing. Ashley Creek challenged the rates as unreasonably high and requested that they be suspended and an investigation ordered. The Commission denied the request and the rates became effective.[13]

[12] *Ashley Creek Phosphate Company v. Chevron Pipe Line Company*, 5 I.C.C.2d 303 (1989).

[13] Suspension Case No. 71469, *Phosphate Slurry, Vernal, UT, to Rock Springs, WY, Chevron Pipe Line* (not printed), served June 23, 1989.

INTERMODAL TRANSPORTATION

During fiscal year 1989, the Commission continued to promote the growth of intermodal transportation through the use of statutory exemptions from its regulations. Eight such exemption petitions concerning mergers, acquisitions, or control proposals were processed during the fiscal year and, of these, seven were granted. In the remaining case, the Commission ordered an investigation.

The USX Corporation (USX) obtained several exemptions related to its transfer of control of seven Class II and Class III rail carriers and one water carrier to Blackstone Partners, Limited (Blackstone).[1] The Commission exempted Blackstone from the prior approval requirements applicable to noncarrier control applications.[2] It also found that common control of the rail and water carriers was not prohibited by the Panama Canal Act,[3] because the carriers at issue do not serve common points or compete for the same traffic.[4] Finally, the Commission found that the prohibition against a railroad transporting goods manufactured by it or in which it has an interest[5] did not apply to USX, because there was no proof that USX, which retained a substantial minority interest in the carriers, would be able to exert undue control over the operations of the railroad. Because the statutory prohibition did not apply to USX, no exemption was necessary.

Blackstone was also involved in the one acquisition exemption petition in which an investigation was ordered.[6] Following the above-described transaction with USX, Blackstone controlled certain Class II and Class III rail carriers and two water transportation companies. Blackstone then petitioned for an exemption from the prior review and approval requirements of 49 U.S.C. 11343 and 49 U.S.C. 11321 with regard to its proposed acquisition of the Chicago and North Western Company (CNW), a Class I railroad. CNW also filed for an exemption relating to the financing of the proposed transaction. To study certain issues relating to the financing, the Commission stayed the exemption and ordered an investigation. That investigation was pending at the end of fiscal year 1989.

The Commission continued to recognize that acquisitions by combined rail-motor carriers may not be exempted from approval under 49 U.S.C. 11343(e),[7] but may be exempted under Section 10505 if requisite findings under Section 11344(c) are made. Under Section 11344(c), the Commission may approve a transaction only if it finds that the transaction is consistent with the public interest, will enable a rail carrier to use motor carrier transportation to public advantage, and will not unreasonably restrain competition. Thus, when Federal Industries, Limited (Federal) (a noncarrier holding company that owns three motor carriers and a rail carrier) sought to acquire CF Kingsway, Inc. (a noncarrier holding company that controls three motor carriers), two separate exemptions were needed.

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[1] Finance Docket No. 31363, *Blackstone Capital Partners L.P., Blackstone Transportation Partners L.P. and USX Corporation – Exemption From 49 U.S.C. 10746, 11321, and 11343* (not printed), served December 23, 1988.

[2] 49 U.S.C. 11343; 49 U.S.C. 10505.

[3] 49 U.S.C. 11321.

[4] 49 U.S.C. 11321(a)(1).

[5] 49 U.S.C. 10746.

[6] Finance Docket No. 31493, *Blackstone Capital Partners L.P. – Control Exemption – CNW Corporation and Chicago and North Western Transportation Company*; Finance Docket No. 31493 (Sub.-No. 1), *Notice of Exemption – Issuance of Securities and Assumption of Obligations and Liabilities – Chicago and North Western Transportation Company and Midwestern Railroad Properties, Incorporated.*

[7] *See Regular Common Carrier Conf. v. ICC*, 820 F. 2d 1323 (D.C. Cir. 1987).

The acquisition of the motor carriers by Federal fell under the class exemption for transactions among motor carriers.[8] The common control of Kingsway and of Federal's rail line, however, required a formal exemption under Section 10505 after a finding that the transaction met the requirements of Section 11344(c).[9]

In a case involving National Intergroup, Inc. (National), the Commission held that when a non-carrier holding company seeks an exemption to continue in control of a rail-motor carrier, and the transaction is merely a change in form and not in substance, the second part of Section 11344(c) need not be met.[10] National, a holding company primarily engaged in manufacturing, controls a small Class III railroad and three motor carriers to serve its affiliated manufacturing companies. The transaction at issue entailed the successive transfer of the assets of the carriers to a partnership and then a limited partnership, both of which would also be controlled by National. Because the proposed transaction would affect the form of the carriers, but not their transportation activities, the rail carrier was not required to make a specific showing that it would use the motor carrier to public advantage.

In a similar case, Washington Corporations, Inc., which controlled Montana Rail Link, Inc. (MRL), a rail carrier, sought an exemption under Section 10505 to acquire control of a motor carrier, Western Transport Crane and Rigging, Inc. (WTCR). Because WTCR was originally controlled by Washington, the Commission found that the transaction did not involve the acquisition of a motor carrier by a rail carrier and that the public advantage requirements thus did not apply. However, the Commission also found that the public advantage requirements of Section 11344(c) were met to the extent that Washington intended to establish intermodal operations between WTCR and MRL and would use the motor carrier's operations to supplement rail operations. Considering these elements and that the proposed transaction would not restrain competition, the Commission found that the transaction met the Section 11344(c) requirements and granted the exemption.[11]

In its 1984 decision approving CSX Transportation, Inc.'s (CSX) acquisition of control of American Commercial Lines, Inc. (ACL), the Commission had imposed reporting and oversight conditions designed to monitor the effects of the acquisition on competition.[12] In the fourth such oversight proceeding, the Chief Administrative Law Judge found no indication that the consolidation had resulted in competitive harm.[13] The Commission agreed, reopened the proceeding, and removed the fifth-year oversight requirement, which it found unnecessary.[14]

The Commission also granted the application of CSX and ACL for control

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[8] 49 CFR 1186.

[9] Finance Docket No. 31384, *Federal Industries Limited – Control Exemption – CF Kingsway Inc.* (not printed), served March 31, 1989.

[10] Finance Docket No. 31273, *National Intergroup, Inc. – Control Exemption – The Permian Corp. D/B/A Western Oil Transportation, Inc.*, Finance Docket No. 31274, *National Intergroup, Inc. – Continuance in Control Exemption Permian Operating Limited Partnership*, and No. MC-FC-83265, *The Permian Corp., Inc. – Transfer Exemption – Permian Operating Limited Partnership* (not printed), served January 24, 1989.

[11] Finance Docket No. 31412, *Washington Corporations – control Exemption – Western Transit Crane and Rigging, Inc. and Montana Rail Line, Inc.* (not printed), served August 24, 1989.

[12] *CSX Corporation Control – American Commercial Lines, Inc.*, 2 I.C.C. 2d 490, (1984) *aff'd sub nom., Crounse Corporation v. ICC*, 781 F. 2d 1176 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 290 (1986).

[13] Finance Docket No. 30300, *CSX Corporation – Control – American Commercial Lines, Inc.* (not printed), served May 18, 1989.

[14] Finance Docket No. 30300, *CSX Corporation – Control – American Commercial Lines, Inc. (Fourth Annual Oversight Proceeding)* (not printed), served August 25, 1989.

of SCNO Barge Lines, Inc. This application was pending at the end of last fiscal year.[15]

Prior to the beginning of the fiscal year, the Commission had determined that it has exclusive jurisdiction to regulate both the water and motor segments of certain joint, through movements between Puerto Rico and inland points in the United States.[16] During the fiscal year, however, a water common carrier and its motor carrier subsidiary had petitioned the Commission after a complaint challenging the nature of their service between Puerto Rico and the U.S. had been filed with the Federal Maritime Commission. As a result, the Commission instituted a declaratory order proceeding [17] to determine: (1) whether the Commission has primary and exclusive jurisdiction to judge the lawfulness of tariffs filed with it so that a petitioner challenging the nature of the service provided under that tariff must do so before the Commission, and (2) whether the particular service is truly a through intermodal service subject to the Commission's jurisdiction. As the fiscal year closed, the Commission was awaiting comments from interested parties.

[15] Finance Docket No. 31247, *CSX Corporation and American Commercial Lines, Inc. – Control – SCNO Acquisition Corporation* (not printed), served December 5, 1988.

[16] No. MC-C-30017, *Valley Freight Systems, Inc. v. Trailer Marine Transport Corporation* (not printed), served July 25, 1988.

[17] No. MC-C-30168, *Puerto Rico Maritime Shipping Authority and PRMMI Trucking, Inc. – Petition for Declaratory Order* (not printed), served August 3, 1989.

ENERGY AND ENVIRONMENT

Energy and environmental issues are addressed by the Section of Energy and Environment (SEE) within the Commission's Office of Transportation Analysis. The SEE fulfills its responsibilities primarily through its environmental review of cases, the preparation of environmental assessments and environmental impact statements, and by advising the Commission on environmental matters in its decision-making. During fiscal year 1989, the number and types of proceedings for which environmental documentation was prepared resembled those of past years, and included railroad abandonments, mergers, acquisition and construction cases, and several rulemakings.

A number of significant environmental issues were addressed last year. In a proceeding involving a rail line abandonment by the Iowa Southern Railroad Company, the Commission determined that it was not required to assess the environmental effects of subsequent trails use of abandoned right-of-way.[1] In an acquisition by Rio Grande Industries, Inc. (RGI) of a line of the Chicago, Missouri and Western Railroad Company, which was referred to the Commission by a bankruptcy court, the SEE expeditiously prepared an environmental assessment to allow the Commission to comply with an accelerated time schedule requested by the court for the Commission's decision.[2]

In another proceeding involving construction of a rail line to serve a Southern Electric Generating Company facility in Alabama, the Commission approved a petition for exemption of the construction of that facility, but made the decision effective upon completion of the Commission's environmental review of the project.[3] This follows the precedent recently established by a court in its review of the Commission's two-year, out-of-service abandonment exemption allowing review of the environmental consequences of an abandonment after publication of the notice as long as an environmental review is completed by the time the abandonment becomes effective.[4]

During the past fiscal year, the SEE has had to devote considerable time to carrying out the historic review process required by Section 106 of the National Historic Preservation Act (NHPA)[5] for more than 200 rail line abandonments and acquisitions. The SEE is currently formulating an approach to dealing with historic preservation matters in the context of abandonments as well as several large, pending finance proceedings.

One such case involves the operation by Wisconsin Central Ltd. of approximately 2,000 miles of railroad acquired from the Soo Line Railroad Company, and another involves the sale of Southern Pacific Transportation Corporation (SPTC) property to finance the costs of SPTC's acquisition by RGI.[6] Yet another case involves the discontinuance of rail service by the Cimmaron River Valley Railroad, where the Commission determined that the historic review process does not apply to structures that are not part of a rail line and that such structures are not affected by

[1] *Iowa Southern R. Co.—Exemption—Abandonment*, 5 I.C.C.2d 496 (1989).

[2] *Rio Grande Industries, et al.—Pur & Track—CMW Ry. Co.*, 5 I.C.C.2d 952 (1989).

[3] Finance Docket No. 31498, *Southern Electric Generating Company—Petition For Exemption—Construction of a Rail Line in Shelby County, AL* (not printed), served September 18, 1989.

[4] *Illinois Commerce Commission v. I.C.C.*, 848 F.2d 1246 (D.C. Cir. 1988).

[5] 16 U.S.C. 470 *et seq.*

[6] Finance Docket No. 31102, *Wisconsin Central Ltd.—Acquisition of Certain Lines of Soo Line Railroad Company* (not printed), served July 7, 1988, and *Rio Grande Industries—Control—Southern Pacific Transportation Company*, 4 I.C.C.2d 834 (1989).

Commission action.[7] The SEE presently is working toward accommodating the somewhat conflicting goals of NHPA and the Interstate Commerce Act.

Compliance with the National Environmental Policy Act (NEPA)[8], the NHPA, and numerous other environmental statutes represents a significant part of the workload of the Office of Transportation Analysis. To fulfill its responsibility to provide the Commission with an independent assessment of the potential environmental and historic effects of a proposed action, the environmental staff expends considerable time and resources working with various federal, state and local officials and carrier representatives to obtain sufficient information to assess potential environmental effects and to verify the accuracy of environmental reports supplied by carriers. The time and effort expanded in this effort has contributed to the need for the Commission's recent increase in user fees.[9]

This process of independently assessing the historic and environmental impacts of a proposed carrier action is often incompatible with the Commission's statutory time frames for deciding many cases, especially where SEE must rely on other agencies that are not subject to the Commission's internal and statutory evaluation deadlines. In an attempt to expedite the consideration of environmental issues, the Commission is continuing to re-examine its environmental review procedures and intends to propose revised environmental rules.

[7] Docket No. AB-309X, *Cimmaron River Valley Railway Company – Discontinuance Exemption – In Pawnee and Payne Counties, OK* (not printed), served June 15, 1989.

[8] 42 U.S.C. 4321 *et seq.*

[9] *Regulations Governing Fees for Services – 1989 Update*, 5 I.C.C.2d 817 (1989).

TARIFFS

The 1.25 million common carrier freight tariff filings received at the Commission in fiscal year 1989 reflect a modest decline from the 1.4 million tariff filings received in fiscal year 1988. The steady receipt of tariffs at this level indicates continuation of the intense competition brought about by deregulatory legislation implemented in 1980.

Motor carrier tariff filings remained constant at 1.1 million while rail tariff filings increased slightly to more than 65,000. International ocean/land intermodal tariff filings decreased by 8 percent to nearly 85,000. Water carrier filings increased slightly to over 33,000.

The total of passenger tariff filings by all modes decreased to 2,900 from the previous year's filings of 3,100.

The 33,000 new rail contract filings received in fiscal year 1989 represents a slight increase over the 30,000 contract filings received the prior fiscal year. The continued growth of contract pricing over the past several years indicates that contract pricing is preferred over tariff pricing by a significant segment of the shipping public.

The Commission anticipates further action during 1990 in its rulemaking proceeding which seeks to facilitate the filing and maintenance of tariffs in electronic form.[1] Comments received in the course of this case show strong public interest in the use of computer technology as a means for improved business communication in the highly competitive transportation industry.

Informal Rate Cases

The Commission's Bureau of Traffic used its informal procedures to settle 5,349 cases concerning disputes over rate and tariff matters during fiscal year 1989. This simple and inexpensive process permitted the settlement of most tariff disputes without the need for the institution of time-consuming and costly formal procedures. Several hundred of the disputes involved freight bill claims by auditors and collection agencies for alleged improperly underpaid freight bills of bankrupt motor carriers and freight forwarders. The Bureau was successful in showing that many of the claims were not properly supported and, consequently, a number of improper claims against shippers and receivers of freight were withdrawn.

Every person or group, from individual consumers to large corporations, has an opportunity to utilize the informal rate settlement process and to receive the same expert assistance that is provided by staff to the Commission in formal rate and tariff matters. A further public gain from informal settlement is the dissemination of a knowledge of pertinent law, of the workings of tariffs, and of each party's rights. Such knowledge lessens the potential for future disputes.

The Commission's special docket procedure permits rail and water carriers to seek authority to refund or waive the collection of admittedly unreasonable charges. Four hundred and fifty-eight special docket cases were processed during the year authorizing reparations and waivers amounting to $4,934,171.

Through the Commission's informal complaint proceedings, rail or water shippers may prevent the expiration of the statute of limitations for overcharges or unreasonable charges by writing to the Commission and describing their complaints. If the carrier in question agrees that a particular movement involves overcharges or that charges are unreasonable, refunds or waivers may be made without the need for formal procedures. The Commission processed four such cases on the informal complaint docket during fiscal year 1989.

Bureau staff also assisted the Commission in a proceeding dealing with a complex form of publication that was being used for rail carrier cost recovery

[1] Ex Parte No. 444, *Electronic Filing of Tariffs.*

tariffs.[2] In comments filed in the case, the publisher of the tariffs requested an opportunity to demonstrate its willingness to give more consideration to the user public in the preparation of the tariffs. In view of this, the Commission decided on March 1 to hold further action in the proceeding in abeyance to allow the publisher sufficient time to make changes in its publishing procedures to better accommodate tariff users.

Suspension/Special Permission Board

The Suspension/Special Permission Board is an employee board established by the Commission to act initially for the Commission on matters involving carriers' tariffs, rules, rates and charges.

Matters of suspension involve new or revised rates, charges, or rule provisions that are filed with the Commission in tariff form and concern the interstate transportation services provided by the nation's rail, motor, and domestic water carrier industries. Upon the request of interested or affected parties, proposed tariff changes are considered for possible investigation and/or suspension by the Suspension/Special Permission Board or by the entire Commission. Decisions of the Board are subject to reconsideration by the Commission.

During fiscal year 1989, 70 protests were filed against 43 tariff proposals. Five proposals were suspended; 27 were permitted to become effective; six were permitted to become effective but were investigated; and five were either canceled by the proposing carrier, rejected by the Commission, or protests were withdrawn or filed too late for consideration. There were three unprotested tariff proposals considered by the Board on its own initiative. Of these proposals, one was suspended, one was permitted to become effective, and one was canceled by the proposing carrier.

In addition, eight petitions for Commission reconsideration of Board actions were filed requesting the Commission to vacate the suspensions and/or discontinue the investigations of eight tariff proposals. Four of these petitions were granted, three were denied, and one was withdrawn.

Among the proposals considered were 13 general increases or restructurings of motor common carrier rates and charges filed by regional motor carrier bureaus,[3] and one general increase in rates and charges applicable to household goods shipments which was filed by the Household Goods Carriers' Bureau.

A significant decision made by the Board during the year was its institution of an investigation [4] to determine the lawfulness of motor carrier provisions for minimum charges on general commodity shipments of a light and bulky nature by measuring the linear footage of the vehicle floor space occupied by a shipment in the carrier's trailer. The investigation resulted from statements made by numerous shippers alleging that the linear foot measurement requirement prohibited them from ascertaining their line-haul transportation charges *prior to* their requests for service. Specifically, shippers stated that transportation charges could not be ascertained until a shipment was loaded in a carrier's trailer and a linear foot measurement was made of the floor space that the shipment occupied. Shippers further alleged that linear foot

[2] Ex Parte No. 290 (Sub-No. 6), *Amendments to Rail Carrier Cost Recovery Tariffs.*

[3] Central & Southern Motor Freight Tariff Association, Incorporated; Central States Motor Freight Bureau, Inc.; The Eastern Central Motor Carriers Association, Inc.; Middle Atlantic Conference; Middlewest Motor Freight Bureau; The New England Motor Rate Bureau, Inc.; Niagara Frontier Tariff Bureau, Inc.; Rocky Mountain Motor Tariff Bureau, Inc.; and Southern Motor Carriers Rate Conference, Inc.

[4] No. 40198, *Minimum Charges Based On Linear Foot Of Vehicle* (not printed), served July 13, 1989.

measurements for minimum-charge determination would be confusing since such measurements could vary depending on the size of the trailer used for loading, the configuration of a shipment in the trailer, and rehandling of the shipment by the carrier from pickup to line-haul vehicles. Shippers noted that their ability to ascertain transportation costs prior to requesting service was an important factor in determining a competitive price for their commodities in the marketplace.

The respondent motor carriers noted shipper concerns and voluntarily canceled the "linear foot" provisions from their tariffs. As a compromise measure, the carriers published new minimum-charge provisions which were based on the cubic displacement and density of a shipment as tendered for transportation. These new provisions gave shippers the ability to ascertain minimum charges prior to requesting service, by simply determining the volume and density of their shipments. The Commission found that these new provisions alleviated shipper concerns by providing a reasonable basis for the determination of transportation charges prior to shipment.

Special permission matters involve applications requesting relief from the Commission's tariff-filing regulations. During fiscal year 1989, the Board considered 88 such applications. Of those, 78 were granted, two were denied, and eight were withdrawn or returned before being decided. As a result of the Commission's modification of procedural rules to encourage pricing innovation and tariff simplification,[5] the number of such applications considered by the Commission in fiscal year 1989 declined from that considered in fiscal year 1988.

The Board's decisions in this area continued present or established new tariff policy and benefited the public by reducing tariff publishing costs and paperwork and allowing carriers to quickly react to marketplace opportunities. A number of significant decisions authorized carriers to: (1) use specific tariff formats to facilitate the filing of computer generated paper tariffs;[6] (2) use a format for paper tariffs that is readily convertible to a format for electronic tariffs;[7] (3) correct conflicting rates in an abbreviated manner;[8] and (4) cancel obsolete rates from tariffs in an economic and expeditious manner.[9]

By a significant action of the Commission in fiscal year 1988, the railroad industry was granted an extension of the expiration date, to September 30, 1991, of two master tariffs containing rate increases.[10] Railroads are required to submit a tariff updating plan to ensure that their rate increases are transferred to their basic tariffs by the September 1991 deadline and to file progress reports every three months. Railroads have assured the Commission in their progress reports that the current rate of progress will allow the update of all tariffs by the 1991 deadline. This action benefits the public by shortening the rate-determination process and by simplifying rail tariffs.

A particularly significant action by the Commission involved an application filed by the Canadian National Railway Company (CN) requesting special tariff authority to file tariffs through electronic means. The Commission granted the request,[11] conditioned upon CN's providing the Commission with the necessary hardware and software to implement the electronic filing, filing paper tariffs and electronic tariffs at the same time, and complying with certain other statutory requirements.

[5] No. 37321, *Revision of Tariff Regulations, All Carriers*, served October 1, 1984.

[6] Special Tariff Authority No. 89-64.

[7] Special Tariff Authority No. 89-68.

[8] Special Tariff Authority No. 89-75.

[9] Special Tariff Authority No. 89-92.

[10] No. 40154, *Extension of Expiration Date of Master Tariff Increases, Amendments No. 5 and 12 to Special Tariff Authority*, (not printed), served May 27, 1989.

[11] Special Tariff Authority Application 89-62.

ENFORCEMENT

During fiscal year 1989, the Commission continued to direct its enforcement efforts to coincide with the trend toward reliance on marketplace solutions, rather than regulatory interventions. The Commission's enforcement activities thus were concentrated in those areas in which competition appeared to have been lessened, or where assistance was necessary to aid parties lacking the resources and leverage needed to independently achieve compliance with the Interstate Commerce Act and the Commission's regulations. The Commission placed particular enforcement emphasis on issues involving motor carrier safety and financial responsibility. The following discussion of the Commission's enforcement program during the fiscal year groups pertinent cases under three violation categories: (1) consumer and small business protection; (2) fraudulent activity; and (3) unsafe and uninsured operations. The Commission sought and obtained a large number of consent agreements and court-approved injunctions in fiscal year 1989 to insure future compliance with provisions of both the Interstate Commerce Act and the ICC's regulations, and a total of $106,525 was collected in penalties.

Consumer and Small Business Protection

Included within this program are cases involving violations of leasing regulations designed to prevent owner operator abuses; violations of duplicate payment, overcharge, and loss and damage regulations; and violations of statutes prohibiting holding freight hostage and lumping.

The Commission obtained a judgment of civil contempt against A&E Enterprises, Inc. and Albert R. Puig, of Grapevine, Texas.[1] A court found these defendants in contempt of a 1987 injunction which had sought to prohibit "freight ransoming." The court ordered the defendants to pay the Commission's cost of $3,500 for investigating and prosecuting their case, and suspended payment for as long as the injunction is obeyed. Future violations will result in penalties of $1,000 per shipment, payment of the suspended amount, and any other cost and penalties that the court might impose.

The Commission obtained a judgment of civil contempt against Fleming-Babcock, Inc. and Norman D. Babcock of Riverside, Missouri, for violations of an injunction prohibiting these defendants from paying owner-operators compensation different from the amount specified in a written lease.[2] In this case, the defendants understated gross revenue on shipments in the owner-operator settlements. As a result of the contempt action, the defendants paid owner-operators an additional $9,222.53 and the court ordered them to pay $1,000 for each future violation.

In another case involving violations of the Commission's leasing regulations, Commercial Carriers paid a $14,000 civil penalty for failure to conform its leases to the truth-in-leasing requirements of the regulations.[3] This carrier concurrently entered into a consent agreement and agreed to conform its leases and practices to the requirements of the leasing regulations.

In yet another case, Columbine Carriers Inc., of South Bend, Indiana, was enjoined from entering into equipment leases not containing all of the truth-in-leasing provisions required by regulation and from otherwise failing to comply with regulations.[4] A court also ordered Columbine to make restitution

[1] *Interstate Commerce Commission* v. *A & E Enterprises, Inc. and Albert R. Puig*, Civ. No. 86-403-K (N.D. Tex., July 31, 1989).

[2] *Interstate Commerce Commission* v. *Fleming-Babcock, Inc. and Norman D. Babcock*, Civ. No. 87-242-CV-W-3 (W.D. Mo., July 5, 1989).

[3] No. MC-43038, *Commercial Carriers Inc.* (March 31, 1989).

[4] *Interstate Commerce Commission* v. *Columbine Carriers, Inc.*, Civ. No. S85-648 (N.D. Ind., November 3, 1988).

to owner-operators in the form of interest payments for monies withheld to cover an equipment repair fund, the advance collection of license fees, and monthly payments on tractors.

Pre-Fab Transit Company and an affiliated carrier, Cheyenne Express, both of Farmer City, Illinois, were enjoined from the use of equipment leases not containing all of the truth-in-leasing provisions.[5] The court also enjoined Pre-Fab from failing to pay owner-operators trip leased to other carriers within 15 days of the owner operators' submission of delivery documentation.

In another case involving owner-operator abuses, Specialized Trucking, Inc., of Tacoma, Washington, was permanently enjoined against failing to compensate its owner-operators within 15 days after the submission of required paperwork.[6]

The Commission obtained an injunction against Best Refrigerated Express, Inc. of Omaha, Nebraska, enjoining that trucking company from violating regulations governing leasing and the processing and disposition of loss-and-damage and overcharge claims.[7] Best had intermingled different types of claims; failed to properly record, acknowledge, and dispose of claims, and performed transportation in leased equipment without a written lease or with a lease that did not comply with leasing regulations.

In a case involving duplicate payments, Holmes Transportation, Inc., of Westboro, Massachusetts, was enjoined from failing to comply with refund procedures governing the processing of overcharges, duplicate payments, over-collection claims, and unidentified freight charge payments received from shippers.[8] The injunction also required Holmes to establish an escrow fund in the amount of $502,000 for the payment of all outstanding unidentified and duplicate payments, and to make restitution.

The Commission obtained an injunction against BeMac Transport Co. Inc., of St. Louis, Mo., prohibiting that carrier from failing to settle overcharge claims within 60 days of their receipt.[9] The injunction also enjoined the carrier from failing to refund duplicate payments and overcharges that are not the subject of a claim within 30 days of discovery. In accordance with the terms of the injunction, the carrier refunded over $114,000 in duplicate payments retained for more than 30 days.

In a case involving lumping, judgments were entered against Joseph Russo and Jack Pellicio in the amount of $10,000 each.[10] These two defendants, operating Stanley Russo and Sons, a fruit concession at the Hunts Point Food Center in the Bronx, New York, were charged with charging truck drivers for unloading assistance even though the drivers had brought their own helpers to unload the trucks. Preventing drivers from providing their own helpers to unload is a violation of the statute prohibiting coercive loading and unloading practices.

Fraudulent Activity

Included within the category of fraudulent practices are cases involving insurance schemes to defraud motor carriers, shippers, and insurance companies; kickback schemes; fraud upon the Commission; and cases involving violations of ethical standards governing the conduct of attorneys and practitioners who represent clients before the Commission.

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[5] *Interstate Commerce Commission* v. *Pre-Fab Transit Co., et al.*, Civ. No. 88-3122 (C.D. Ill., June 7, 1989).

[6] *Interstate Commerce Commission* v. *Specialized Trucking Service, Inc.*, Civ. No. C-88-263TB (W.D. Wash., November 22, 1988).

[7] *Interstate Commerce Commission* v. *Best Refrigerated Express, Inc.*, Civ. No. 89-0-259 (D. Neb., July 31, 1989).

[8] *Interstate Commerce Commission* v. *Holmes Transportation Inc.*, Civ. No. 88-78 (D. Mass., December 12, 1988).

[9] *Interstate Commerce Commission* v. *BeMac Transport, Co., Inc.*, Civ. No. 88-1964-C-5 (E.D. Mo., January 19, 1989).

[10] *United States* v. *Stanley Russo & Sons*, No. 86 CIV 2100 (S.D. N.Y., February 28, 1989).

The Commission participated in several criminal investigations involving transportation issues which resulted in convictions under federal statutes.

In one case, Alan R. Campbell, Vice-President and co-owner, and Sidney K. Evans, Office Manager of Transportation Services, Inc., of Destin, Florida, entered guilty pleas to charges of conspiring to conduct and participate in a pattern of racketeering activities. The racketeering activities involved a scheme to defraud various motor carriers and insurance companies, and to use the U.S. Postal Service and the interstate travel of various individuals to execute the scheme.[11] The scheme involved the execution of numerous lease agreements, and other documents, to create purported insurance for various trucking companies under an agency/lease, and a purported group insurance policy with an ICC motor carrier that was not conducting motor truck operations. Sentencing was pending at the close of the fiscal year.

In another proceeding, Charles Ray Stringfellow entered a plea of guilty to three counts of mail fraud and was sentenced to two years' imprisonment on each count, to run concurrently.[12] That plea resulted from an investigation into the payment of kickback money to Stringfellow by an ICC-authorized carrier for the transportation of shipments of property for Stringfellow's employer. Execution of the sentence was suspended, and Stringfellow was placed on three years' probation, with special conditions attached prohibiting the possession of firearms, requiring the timely filing of Internal Revenue Service tax returns with a probation officer, and 100 hours of community service.

Another case saw Bobby R. Johnson, of Cincinnati, Ohio, plead guilty to one count of making false statements to the Commission in the filing of applications for operating authority, in violation of 18 U.S.C. §1001.[13] Johnson also agreed to leave the trucking business. In a related matter, Shirley Davis, a former employee of the Military Traffic Management Command in Oakland, California, pleaded guilty to accepting a gratuity in violation of 18 U.S.C. §201. Johnson and Davis had been indicted in connection with a scheme to obtain military freight for carriers that had been disqualified from handling such traffic by the U.S. Department of Defense. Violations of 18 U.S.C. §1001 are punishable by up to five years in prison and/or a $10,000 fine, and violations of 18 U.S.C. §201 are punishable by up to two years in prison and/or a $250,000 fine. Sentencing was pending at the close of the fiscal year.

Bobby J. Dunlap, operating individually and doing business as Eagle Transportation, was enjoined from falsifying permits, certificates of insurance, and other transportation-related documents issued by the Commission.[14] The carrier was also enjoined from holding itself out as a motor carrier and operating as a broker without a license and a bond in effect and on file with the Commission.

In a major enforcement proceeding, the Commission found that Ralph J. Zola, North American Transport Co., Inc., and Auto Caravan Corp. had willfully violated an earlier Commission order revoking the operating authority of a carrier of motor vehicles previously

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[11] *United States* v. *Alan R. Campbell, d/b/a Transportation Services, Inc.*, No. 88-0309-01/RV (N.D. Fla., October 18, 1988); and *United States* v. *Sidney K. Evans*, No. 88-03117-01/RV (N.D. Fla., December 22, 1988).

[12] *United States* v. *Charles Ray Stringfellow*, No. 88-254-CR-T-17 (M.D. Fla., December 20, 1988).

[13] *United States* v. *Bobby R. Johnson*, No. CR-1-89-018-01 (S.D. Oh., September 1, 1989); and *United States* v. *Shirley J. Davis*, No. CR-1-89-018-03 (S.D. Oh., September 1, 1989).

[14] *Interstate Commerce Commission* v. *Bobby J. Dunlap an individual, and d/b/a Eagle Transportation Services Co.*, No. CA3-88-3082H (N. D. Tex., April 24, 1989).

owned by Mr. Zola.[15] The Commission found that Mr. Zola had evaded the revocation order by acquiring the stock of an operationally defunct carrier and using its operating authority to continue operations that the Commission had ordered terminated. The Commission revoked the replacement operating authority and directed Mr. Zola to cease and desist from engaging in any transportation activity within the Commission's jurisdiction.

During the year, the Commission suspended an attorney from the privilege of practicing and representing others before the agency for 60 days.[16] The attorney had made false, misleading, and deceptive advertising claims in violation of the Commission's Canons of Ethics by guaranteeing the success of each application filed through his services.

The Commission suspended another attorney from practice for two years based upon his suspension from the courts of the State of Michigan.[17] To obtain reinstatement, the attorney must discontinue the practices cited by the Michigan Attorney Discipline Board and ensure that such ethics violations do not recur.

In another case, the Commission reprimanded an ICC practitioner and suspended him from practice for one year.[18] The Commission had found that this practitioner had represented clients with conflicting interests, prepared and filed false documents, certified irregularly filed applications with the Commission, and failed to exercise candor in dealing with his clients.

[15] No. MC-C-30003, *Ralph J. Zola, North American Transport Co., Inc., and Auto Caravan Corp. – Show Cause Proceeding* (served June 30, 1989), 5 I.C.C. 2d 655 (1989). Appeal pending, No. 89-3499 (3rd Cir.), oral hearing held September 29, 1989.

[16] Ex Parte No. 482, *In the matter of Jack L. Schiller* (not printed), served June 27, 1989.

[17] Ex Parte No. 479, *In the matter of Leo C. Gilhool* (not printed), served January 27, 1989.

[18] Ex Parte No. 470, *In the matter of William Sheridan* (not printed), served October 20, 1988.

Unsafe or Uninsured Operations

All motor carriers seeking operating authority from the Commission must establish that they are fit to conduct the operations they propose and are willing to conform to statutory and administrative requirements, including Federal Motor Carrier Safety Regulations. Safety fitness is a primary concern of the Commission.

All applications filed by carriers holding "unsatisfactory" safety ratings and all applications for motor passenger or hazardous materials authority filed by carriers holding "conditional" ratings are rejected by the Commission. All other applications filed by carriers holding "conditional" safety ratings are examined on a case-by-case basis. Such applicants must submit evidence addressing the measures they have taken to achieve full compliance with U.S. Department of Transportation (DOT) safety requirements and to correct any deficiencies cited in the audit upon which their performance rating was based. Proof that an applicant has requested a reaudit by the DOT must also be submitted. Generally, where an applicant in this category has requested a reaudit by DOT, has affirmatively established that it has eliminated any safety deficiencies cited, and has brought its operations into full compliance with DOT regulations, the Commission will tentatively grant authority, subject to a one-year term limitation. This authority expires after one year unless an applicant petitions to remove the term limitation based upon its receipt of a "satisfactory" safety rating.

The Commission's insurance compliance program emphasizes the use of consent agreements to cure insurance deficiencies. The Commission's regulations specify minimum insurance levels for various types of carriers and, when coverage expires or is cancelled, the Commission's field staff conducts an investigation. Where violations are found, the Commission then seeks voluntary

compliance through consent agreements by which involved carriers agree not to operate until they have obtained appropriate insurance coverage. During fiscal year 1989, the Commission obtained 1,484 consent agreements in insurance cases. As appropriate, the Commission takes stronger enforcement action for lack of insurance where carriers fail or refuse to obtain prescribed insurance. Last fiscal year, 95 injunctions were obtained against carriers lacking adequate insurance.

The Commission conducts follow-up investigations to ensure that these carriers are complying with consent agreements and injunctions and that they are conducting interstate operations with appropriate levels of insurance. Carriers that continue to operate without appropriate insurance are subject to appropriate remedial action, including contempt actions.

A judgment of civil contempt was entered against William L. Cunningham for violating an injunction prohibiting him from arranging or providing the transportation of household goods in interstate commerce without ICC authority and insurance.[19] The court ordered Mr. Cunningham to pay $15,000 in restitution to shippers who used his services. Mr. Cunningham was also enjoined from using the trade names of any other household goods carriers.

In another civil contempt case, John Tackett of Ashdown, Arkansas, was found in contempt for violating an injunction prohibiting the transportation of property without having evidence of liability insurance coverage and without having appropriate operating authority.[20] Under the terms of the contempt judgment, Mr. Tackett was required to pay $287,595 as a forfeiture of the amounts he received while engaged in the prohibited transportation. Payment of the judgment amount was suspended on the condition that Mr. Tackett not violate the injunction again. If he does so, he will have to pay the suspended amount, plus $1,000 for each future violation and any costs and penalties the courts may impose.

In yet another civil contempt case, John M. Negrete, of Phoenix, Arizona, was held in contempt for having disobeyed an injunction prohibiting him from engaging in uninsured motor carrier operations.[21] A court imposed a prospective fine of $500 for every instance of unauthorized transportation of household goods, and a similar amount if such operations are conducted without insurance.

In another case involving disobedience of an injunction prohibiting uninsured operations, Roy D. Nickell and Trans Continental Consolidators, of Cucamonga, Calif., were found in contempt of court.[22] A $5,000 fine was suspended and a prospective penalty of $5,000 per shipment for any subsequent violations of the court's order was established. Roy D. Nickell was also ordered to serve a 48-hour prison term for each uninsured shipment transported in the future.

The Commission exercises its powers to issue cease-and-desist orders, as well as suspensions and revocations of authority where motor carriers have demonstrated a continuing failure to comply with the Federal Motor Carrier Safety Regulations.[23] The Commission thus revoked the authority held by Mill Basin Transit, Inc. and

[19] *Interstate Commerce Commission v. Northline Moving & Storage, Inc. et al.*, Civ. No. H-80-2656 (S. D. Tex., February 6, 1989).

[20] *Interstate Commerce Commission v. John Tackett*, Civ. No. 88-4068 (W.D. Ark., July 12, 1989).

[21] *Interstate Commerce Commission v. John M. Negrete, an individual d/b/a Arizona Discount Movers, and 50 States Moving and Storage*, Civ. No. 86-0145 PHX RCB (D. Ariz., February 10, 1989).

[22] *Interstate Commerce Commission v. Roy D. Nickell, an individual, and Trans Continental Consolidators, Inc.*, Civ. No. 85-4619-SVW(KX) (C.D. Calif., August 21, 1989).

[23] 49 U.S.C. §10925.

Rapid Express Coach, Inc. The Commission found that the carriers were operated in a unsafe manner and that their principals demonstrated a continuing disregard for, and inability to comply with, pertinent transportation laws and regulations.

Safety Fitness Procedures

Motor carrier safety continues to be a primary concern when the Commission evaluates the fitness of an applicant for new or expanded authority. Consistent with the intent of the Motor Carrier Safety Act of 1984,[34] the Commission continued its efforts to identify motor carriers with questionable safety records and to scrutinize the safety profiles of applicants seeking authority.

During the year, the Commission adopted a new policy governing the submission and evaluation of safety fitness evidence in motor carrier licensing proceedings.[35] To eliminate confusion, streamline its internal process, and expedite final decisions, the Commission moved its examination of fitness to the beginning of the application process. It placed the burden on applicants, at the time of filing, to inform the Commission of their current safety ratings as assigned by DOT. It advised potential applicants that: (1) all applications filed by carriers holding "unsatisfactory" safety ratings would be rejected;[36] (2) all applications seeking authority to transport passengers or hazardous materials filed by "conditional" rated carriers would be rejected; and (3) all other applications filed by carriers with conditional ratings would be reviewed on a case-by-case basis and either approved, subject to a one-year term limitation, or denied. Rejections would be made without prejudice to the applicants' refiling after they have obtained upgraded safety ratings. Decisions in proceedings involving conditional-rated, non-hazardous property carriers would be based on required evidence that applicants have taken steps to correct all safety deficiencies and to achieve full compliance with DOT requirements and have requested a new safety audit.

Under prior policy standards and new standards applied in December 1988, the Commission processed approximately 600 licensing cases involving questionable safety fitness in fiscal year 1989. During that period, the Commission denied the applications of 28 applicants holding unsatisfactory ratings, and also rejected 28 others. The Commission also denied the applications of 48 conditionally rated applicants, and rejected 236 other applications.

In a number of instances in which applicants for authority held conditional safety ratings—an indication of DOT's willingness to accord such carriers the opportunity to improve their safety compliance records—the Commission granted the authority sought, subject to a one-year term limitation. During the past fiscal year the Commission granted 110 one-year, limited-term certificates and permits to carriers holding conditional safety ratings. Such limited-term authority was issued with the understanding that the involved operating rights would expire at the conclusion of the term unless the carrier had received a satisfactory safety rating by that time. During the year, the Commission denied the requests of 14 carriers for an extension of the limited term. It granted unrestricted authority to 120 applicants upon a showing that their rating had improved to "satisfactory". The Commission also granted extensions of limited-term authorities in seven proceedings involving carriers that continued to hold conditional safety ratings when circumstances warranted additional time to

[34] P.L. No. 98-554 (October 11, 1984).

[35] *Safety Fitness Evidence Licensing Procedures*, 5 I.C.C.2d 94 (1988).

[36] In the past, the Commission either denied these applications or granted them but withheld the actual issuance of any authority until DOT upgraded applicants' safety ratings. Rejection will allow return of the filing fee.

permit them to receive new DOT ratings.

The Commission also continued to treat safety fitness as a substantive issue for consideration in determining whether to approve transfers under 49 U.S.C. 10926 and to grant exemptions under 49 U.S.C. 11343(e) for the purchase or merger of motor carrier authority. During fiscal year 1989, the Commission considered a number of proceedings in which either the transferor or the transferee held less than a satisfactory rating. Where a conditional safety rating was involved, the Commission granted three conditional, one-year approvals and denied or rejected 24 petitions or applications. The Commission approved five transactions upon a showing that the involved safety rating had improved from conditional to satisfactory. Where an unsatisfactory safety rating was involved, the Commission denied or rejected 11 petitions or applications. (See the "Mergers and Unifications" section of the "Trucking Companies" chapter for additional discussion of the Commission's policy in this area.)

In view of several carriers' histories of unsafe motor carrier operations, the Commission instituted investigations with a view toward compelling compliance with pertinent statutory and regulatory requirements of the Commission and DOT or toward revoking existing authority.[27] In one proceeding, the Commission revoked two carriers' operating authorities in light of unrebutted evidence showing significant safety violations and unlawful operations.[28]

[27] See, e.g., No. MC-C-30160, *M. Buffani Trucking, Inc. – Investigation and Revocation of Certificate* (not printed), served May 1, 1989.

[28] No. MC-C-30125, *Mill Basin Transit, Inc., and Rapid Express Coach, Inc. – Investigation and Revocation* (not printed), served September 22, 1989.

FINANCIAL OVERSIGHT

The Commission's financial oversight activities include accounting and reporting, financial analysis, cost analysis, cost development, and auditing. These functions involve the preparation, amendment, and interpretation of prescribed accounting and financial reporting rules; the examination and analysis of accounts and financial statements; the analysis of cost and financial evidence submitted by parties to proceedings before the Commission; and the compilation and publication of transportation statistics and cost studies.

Accounting and Reporting Rulemaking

The Commission's prescribed accounting and reporting systems are continually reviewed to provide current, useful information. This review program includes the updating of these systems to correspond with generally accepted accounting principles (GAAP), and to reduce reporting burdens while retaining those requirements which provide data needed by the Commission.

During fiscal year 1989, the Commission revised the reporting requirements for motor carriers of property. After intensive consideration, the Commission reduced the Annual Report Form M from 60 pages to 10 pages and the Quarterly Report Form QFR from nine pages to three pages. It is estimated that this action will reduce the annual reporting burden by about 64,000 hours.[1]

The Commission also adopted new rules governing the accounting and reporting classification of private motor carriers with backhaul authority. Now, private carrier revenues will be excluded from total revenues in the determination of whether private carriers are subject to accounting and reporting requirements. Thus, only private carriers with annual revenues from common and contract carriage which exceed the Class I and Class II motor carrier minimum revenue levels will be subject to Commission accounting and reporting.[2]

In the railroad area, a new "Statement of Cash Flows" was added to the Annual Report Form R-1 filed by Class I railroads to provide for improved financial analysis of cash flows. The new statement replaced the "Statement of Changes in Financial Position" and "Statement of Changes in Working Capital" and conforms to the Financial Accounting Standards Board revision to GAAP. This new Statement of Cash Flows will also be included in applications for major consolidations initiated under 49 U.S.C. 11343.[3]

The Commission also adopted new reporting requirements for railroad revenue adequacy findings by adding Schedule 250, "Consolidated Information for Revenue Adequacy Determination," to Annual Report Form R-1. Beginning with 1988 findings, the schedule will be used to develop adjusted net railway operating income and adjusted net investment base for each Class I railroad system. The data in this new schedule include consolidated data for all railroads within a system, together with railroad-related operations of affiliated companies, and interest income attributable to the working capital component of the net investment base. Excluded are income taxes associated with non-rail income and expenses.[4]

Cost and Financial Analysis

Last year, the Commission analyzed cost and financial evidence submitted by railroads and other entities in

[1] *Elimination of Accounting and Reporting Requirements for Motor Carriers of Property*, 5 I.C.C. 2d 17 (1988).

[2] *Elimination of Accounting and Reporting Requirements for Private Carriers*, 5 I.C.C. 2d 777 (1989).

[3] Accounting Series Circular No. 201, *Adoption of Accounting Standards – FAS No. 95, Statement of Cash Flows* (not printed), dated January 13, 1989.

[4] *Supplemental Reporting of Consolidated Information for Revenue Adequacy Purposes*, 5 I.C.C.2d 65 (1988).

connection with rates charged for the transportation of coal and other bulk commodities.

Five coal proceedings involved the application of the Commission's Coal Rate Guidelines.[5] In one case, decided by an Administrative Law Judge, market dominance was found and certain rates were shown to exceed stand-alone costs by over $252 million.[6] In two cases, the Commission reaffirmed a finding of market dominance and outlined a framework for determination of stand-alone cost issues.[7] In another case, the Commission found no market dominance and also further indicated that evidence of stand-alone cost may not be used to establish market dominance.[8] In yet another case, the Commission found that single-line rates were not shown to be unreasonable.[9]

The Commission also analyzed cost and financial evidence submitted in connection with railroad applications to abandon selected line segments. These analyses took into account the avoidable loss or gain which would result from each abandonment through the determination of applicable revenues and avoidable costs.

During the fiscal year, the Commission modified both its rail abandonment and light density line surcharge rules to improve the accuracy of data filed as evidence and to reflect recent findings of the Railroad Accounting Principles Board.[10] The Commission also made other modifications to its rail abandonment rules during the year, including those necessary to reflect a revised treatment of property taxes and return on investment in equipment.[11]

The Commission additionally determined that the railroad industry's 1988 cost of capital rate was 11.7 percent.[12]

As the fiscal year came to a close, the Commission was preparing to issue its findings of the revenue adequacy of the Class I railroads for the year 1988.[13]

The Commission analyzed the financial data which were included in applications filed by motor carriers of property and passengers requesting approval to be self-insured for bodily injury and property damage claims and/or cargo claims. In evaluating each applicant's financial ability to fund its proposed self-insurance program, the Commission determined whether (1) additional data would be necessary to properly complete an evaluation; (2) approval of a self-insurance plan was warranted and should include conditions or restrictions to ensure the availability of sufficient resources to pay claims for statutory minimum coverage levels; or (3) an application should be denied.

The Commission continued to evaluate the financial condition of large transportation companies. Reports were publicly released each quarter, which contained the latest revenues, earnings and traffic volume data of Class I

[5] *Coal Rate Guidelines, Nationwide*, 1 I.C.C. 2d 520 (1985) ("*Guidelines*"), *aff'd sub nom. Consolidated Rail Corp. v. United States*, 812 F2d 1444 (3d Cir. 1987).

[6] Docket No. 38301S, *Coal Trading Corporation, et al. v. The Baltimore and Ohio Railroad Company, et al.* (not printed), served October 28, 1988.

[7] Docket Nos. 37038, *Bituminous Coal—Hiawatha, Utah, To Moapa, Nevada*, and 37409, *Aggregate Volume Rate on Coal—Acco, Utah, To Moapa, Nevada*, 6 I.C.C. 2d 1 (1989). These proceedings, while not formally consolidated, were handled together for administrative convenience.

[8] Docket No. 38301S (Sub-No. 1), *Westmoreland Coal Sales Company v. Denver & Rio Grande Western Railroad Company, et al.*, 5 I.C.C. 2d 751 (1989).

[9] *Metropolitan Edison Company v. Conrail, et al.*, 5 I.C.C. 2d. 385 (1989).

[10] *Abandonment Regulations—Costing (Implementation of the Railroad Accounting Principles Board Findings)*, 5 I.C.C. 2d 123 (1988); and *Reasonably Expected Costs (Implementation of the Railroad Accounting Principles Board Findings)*, 5 I.C.C. 2d 147 (1988).

[11] *Rail Abandonments—Avoidability of Property Tax Expense Under the Unit Method of Assessment*, 5 I.C.C. 2d 640 (1989); and *Abandonment Regulations—Costing (Revised Treatment of Return on Investment—Equipment)*, 5 I.C.C. 2d 483 (1989).

[12] *Railroad Cost of Capital—1988*, 5 I.C.C. 2d 508 (1989).

[13] Ex Parte No. 483, *Railroad Revenue Adequacy—1988 Determination*.

railroads, 100 of the nation's largest trucking companies, the 15 largest household goods carriers and the 10 largest bus companies.

Cost Development

The Commission adopted the Uniform Railroad Costing System (URCS) as its general-purpose costing system (GPCS) in lieu of Rail Form A which has been historically presented to the ICC as evidence of railroad cost-of-service.[14] In a simultaneously served decision, the Commission also modified certain generally accepted costing conventions.[15] Specifically, the Commission found that its GPCS should reflect depreciation accounting for track structures, an adjustment to reduce the net investment base by the total amount of accumulated deferred taxes, and a rate of return on that net investment base equal to the current cost-of-capital. Both the implementation of URCS and the specific changes had been recommended by the Railroad Accounting Principles Board in its Final Report dated September 1, 1987.

During fiscal 1989, the Commission issued quarterly Rail Cost Adjustment Factor (RCAF) decisions as part of its general-increase procedures. The methodology for calculating the index underlying the RCAF was modified to include an interest element.[16] A productivity adjustment using a five-year (1982-1986) productivity trend was also adopted for application in the second quarter of calendar year 1989.[17] Addition of that adjustment resulted in the publishing of two RCAF's. The RCAF (Adjusted), which includes the productivity adjustment, governs maximum RCAF-based rate levels. Rates on market-dominant traffic, which remain at or below the level of the current RCAF (Adjusted), are immune from challenge. An RCAF without a productivity adjustment, the RCAF (Unadjusted), continues to be published to provide the Commission and the public with readily available information necessary to monitor the course and impact over time of its adoption of an index of rail costs adjusted for productivity. As an outgrowth of this determination, a proceeding was established to request comments on four productivity-related issues.[18] Comments were requested on the issues of: (1) improving the reliability of the ICC Waybill Sample; (2) establishing an averaging period for productivity measurement; (3) direct measurement of inputs; and (4) inclusion of below-the-line charges. A six-year (1982-1987) productivity adjustment replaced the five-year one used for the second and third quarters of calendar year 1989.[19] It was first applied to the fourth quarter 1989 RCAF.

Auditing

Each Class I railroad is required to submit a report from an independent accountant stating that specified data in the Railroad's Annual Report Form R-1 have been examined using agreed-upon procedures, and have been found in compliance with the Uniform System of Accounts for Railroad Companies. The accountant's report on the R-1 is also required to present any material exceptions, which may have come to the accountant's attention during the examination. The Commission reviewed the working papers of independent accountants for

[14] *Adoption of the Uniform Railroad Costing System as a General Purpose Costing System for All Regulatory Costing Purposes*, 5 I.C.C.2d 894 (1989).

[15] *Modifications to General Purpose Costings System—GPCS*, 5 I.C.C.2d 880 (1989).

[16] *Railroad Cost Recovery Procedures*, 5 I.C.C.2d 350 (1989).

[17] *Railroad Cost Recovery Procedures-Productivity Adjustment*, 5 I.C.C.2d 434 (1989).

[18] Ex Parte No. MC-290 (Sub-No. 7), *Productivity Adjustment—Implementation*, (not printed), served April 10, 1989.

[19] Ex Parte No. 290 (Sub-No. 4), *Railroad Cost Recovery Procedures—Productivity Adjustment*, (not printed), served September 20, 1989.

each Class I railroad to determine compliance. Also reviewed were the working papers of independent accountants engaged to audit the procedures used by Class I railroads and the Association of American Railroads (AAR) in developing the AAR Index used to calculate the Rail Cost Adjustment Factor (RCAF). The purpose of this review was to ensure the accuracy and reliability of the source data and the procedures used in the development of the index.

The Commission also investigated transactions between and among railroads and their affiliated companies to determine the impact of such transactions on the railroads' financial condition.

COURT ACTIONS

During fiscal year 1989, the Commission's litigation focused on significant issues under the Staggers Rail Act of 1980, the Motor Carrier Act of 1980, and the Bus Regulatory Reform Act of 1982. The most hotly contested issues concerned the rights and remedies of rail labor, and the Commission's decisions concerning these issues were largely upheld. In instances where the courts reversed or remanded cases to the Commission, the ICC either sought rehearings or reopened its proceedings to reconsider its earlier views.

The past fiscal year saw the Commission's Office of the General Counsel play an active role in defending the Commission's decisions in the U.S. Supreme Court and in the lower federal courts. There were 315 pending cases at the beginning of the fiscal year, and an additional 71 cases were filed during the year. As of September 30, 1989, the courts had decided 49 cases, leaving 337 cases pending at the end of the year. Of the 49 concluded cases, the Supreme Court decided one, there were 3 district court decisions, and the remaining 45 decisions were issued by various federal courts of appeals. The more significant cases are discussed below.

In the rail area, several important concerns were addressed. The most significant controversy was over the issue of whether the Interstate Commerce Act (ICA)[1] or the Railway Labor Act (RLA)[2] is the superseding legislation regarding labor protection in line sale cases approved by the Commission according to 49 U.S.C. 10901. It has been the Commission's view that, in line sale transactions under section 10901, the ICA supersedes the negotiating process of the RLA to ensure that consummation of a sales transaction will not be frustrated by the invocation of the long, drawn out procedures of the RLA.[3]

Rail labor interests asserted a right to RLA remedies and challenged several Commission decisions approving section 10901 line sales, including the sale of the entire Pittsburgh and Lake Erie Railroad (P&LE),[4] the sale of 208 miles of the Chicago and North Western Transportation Company (C&NW) rail lines to the Fox River Valley Railroad (FRVR),[5] and the sale of 826 miles of C&NW rail lines and the assignment of rights to use another 139 miles of C&NW trackage to the Dakota, Minnesota and Eastern Railroad (DM&E).[6]

The Third Circuit Court of Appeals, which heard the litigation arising out of the P&LE sale,[7] held that carrier owed a duty to bargain with its employees over the sale and its effects on employees, and that the sale could be enjoined pending completion of the RLA

[1] 49 U.S.C. 10101 *et seq.*

[2] 45 U.S.C. 145 *et seq.*

[3] The Commission's labor conditions contain an arbitration mechanism for quickly and finally resolving issues arising out of authorized line sale transactions. The RLA, by contrast, is aimed at drawing out the negotiation process as long as possible; even after completion of the extended procedures contained within the RLA, it may not effect a resolution of disputed issues.

[4] Finance Docket No. 31121, *P&LE Railco, Inc.—Exemption—Lines of the Pittsburgh & Lake Erie Railroad Company and the Youngstown and Southern Railway Company;* Finance Docket No. 31122, *Chicago West Pullman Corp.—Continuance in Control Exemption—P&LE Railco, Inc.—Control Exemption—The Pittsburg, Charters and Youghiogheny Railway Co.;* Finance Docket No. 31126, *Railway Labor Executives' Association v. Pittsburgh and Lake Erie Railroad Co., et al.* (not printed) decided Sept. 25, 1987.

[5] Finance Docket No. 31205, *FRVR Corporation—Exemption, Acquisition and Operation—Certain Lines of Chicago and North Western Transportation Company—Petition for Clarification* (not printed), served January 29, 1988.

[6] Finance Docket No. 30889, *DM&E—Exemption, Acquisition and Operation—Certain Lines of the Chicago and North Western Transportation Company* (not printed), served September 8, 1987.

[7] *Pittsburgh & Lake Erie R.R. Co. v. RLEA*, 845 F.2d 420 (3d Cir. 1988) (*P&LE II*); *see also Pittsburgh & Lake Erie R.R. Co. v. RLEA*, 831 F.2d 1231 (3d Cir. 1987) (*P&LE I*).

bargaining process. On review, the Supreme Court held[8] that the RLA does not require a company to begin negotiations with its employees over the company's decision to go out of business.[9] However, the Court disagreed with the Commission's contention that the Norris-LaGuardia Act (NLGA)[10] must be accommodated to the ICA in the circumstances of line sales approved according to Section 10901 to prevent frustration of a transaction. The Court remanded *P&LE* to the Third Circuit for a determination of whether any live issues remain in that case.

While the Third Circuit was considering *P&LE*, two other line sale cases were before the Eighth Circuit. There, rail labor challenged the DM&E and FRVR line sales and the Eighth Circuit agreed with the Commission that the ICA could supersede the RLA in the circumstances of a Section 10901 line sale.[11] After its *P&LE* decision, the Supreme Court, before which writs for certiorari were pending, vacated the judgments of the Eighth Circuit and remanded the cases for reconsideration in light of *P&LE*.

Although the Supreme Court's decision makes clear that "Section 6" notices served after Commission approval and consummation of a sales transaction may not be used to block a sale (thus affirming the agency's authority over the sale of rail lines to non-carrier entities in such circumstances), the decision removes the Commission as the sole, determinative factor in resolving any labor disputes that arise out of a sale (at least as to Section 10901 transactions upon which no labor conditions have been imposed, to which the decision directly applies).

The District of Columbia Circuit also dismissed, as not ripe for review, an appeal by rail labor of a Commission decision involving the relationship between the Commission's authority under Section 11341(a) and the RLA.[12] The Commission had held that the ICA overrode the RLA for purposes of implementing Union Pacific Corporation's acquisition of the Missouri-Kansas-Texas Railroad Company. The court concluded that there was no need to rule on the issue until a case arose calling for the need to apply the ICA to a specific set of facts and to determine the necessity for displacement of RLA rights.

Several important decisions were reached in the area of the Commission's authority to review labor arbitration awards under labor conditions imposed upon approval of various transactions. The District of Columbia Circuit affirmed the Commission's assertion of jurisdiction to review, in the first instance, arbitration awards of benefits under ICC-imposed, employee-protective con-

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[8] *P&LE v. RLEA*, 491 U.S. _____, 109 S. Ct. 2584 (1989).

[9] The Court also held that a union filing of so-called "Section 6" notices under 45 U.S.C. 156, proposing changes in collective bargaining agreements, did not mandate an injunction requiring the railroad to maintain the status quo and postpone the sale of the line. The Court found that the limited duty to bargain with the union in response to the Section 6 notices ended with consummation.

[10] The NLGA prevents federal courts from enjoining labor strikes except in limited circumstances. It was the Commission's view that, in circumstances in which Section 10901 was involved, the ICA superseded the NLGA to prevent a strike disrupting the consummation of a Section 10901 line sale found by the Commission to be in the public interest.

[11] *See, RLEA v. Chicago and North Western Transportation Company*, 848 F.2d 102 (8th Cir. 1988), and *RLEA v. ICC*, 861 F.2d 1082 (8th Cir. 1988). *See also, Burlington Northern R.R. v. United Transportation Union*, 848 F.2d 856 (8th Cir.), *cert. denied*, 109 S. Ct. 499 (1988). In addition, the Seventh Circuit Court of Appeals also upheld the FRVR sale against a second challenge by rail labor grounded on the RLA. *Chicago and North Western Transportation Company v. RLEA*, 855 F.2d 1277 (7th Cir. 1988) *cert. denied*, 109 S. Ct. 493 (1988).

[12] *Railway Labor Executives' Association v. ICC*, No. 88-1391 (D.C. Cir., August 29, 1989), reviewing Finance Docket No. 30800, *Union Pacific Corp. – Control – Missouri-Kansas-Texas R.R. Co.*, 4 I.C.C. 2d 409 (1988).

ditions.[13] However, the same court, in a case consolidating two Commission decisions[14] that reviewed the awards of two arbitration committees, reversed and remanded those decisions.[15] The committees, acting according to the Commission's *New York Dock*[16] labor conditions, set the terms for implementing the post-merger consolidation of two combining railroads' repair shops in one case, and locomotive dispatching in the other. The court's ruling—on a fairly narrow but very significant issue—concluded that the Commission did not have the power under Section 11341(a) to override provisions in collective bargaining agreements, even provisions that may impede the carrying out of an approved consolidation. The court declined to address whether the Commission had the challenged power because of the mandatory, binding arbitration provided for in the labor-protective conditions imposed. It also declined to resolve the issue whether RLA remedies are foreclosed by Section 11341(a) and remanded the issue to the Commission for further discussion. The Commission reopened this case and is seeking comments by the parties and the public on the issues involved.

Another question regarding rail acquisitions under Sections 11343-11344 was in a case heard but not decided by the Fifth Circuit.[17] In that case, rail labor challenged the Commission's findings that Rio Grande Industries, Inc. will be viable after acquiring Southern Pacific Transportation Co. and that the two carriers' motor carrier subsidiaries' employees were not entitled to labor protection.

Another important area concerns the bankrupt debtor railroad, the Chicago, Missouri & Western Railway Company (CMW). CMW is the first major railroad to have filed for Chapter 11 reorganization under the Bankruptcy Code. On August 24, 1988, over the objections of CMW's creditors, a bankruptcy court approved the CMW Trustee's authority to incur a "superpriority debt" from agencies of the State of Illinois whose offer of loans made it possible for the railroad to avoid becoming cashless.[18] The Commission participated in that proceeding and advanced the view that the public interest in continued rail service supported the Trustee's application. On appeal, the district court reversed the bankruptcy court. It found that the public interest is not a factor to be taken into account in deciding whether a superpriority loan can be approved. Rather, it concluded that the only relevant question is whether secured creditors are adequately protected.[19] This issue has been appealed further to the Seventh Circuit,

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[13] *IBEW v. ICC*, 862 F.2d 330 (D.C. Cir. 1988), *aff'g, Chicago & North Western Transp. Co.—Aband.—Near Dubuque and Oelwein, IA*, 3 I.C.C. 2d 729 (1987) and *Chicago & North Western Trans. Co.—Aband.—Between Oelwein, IA and Randolph, MN*, 3 I.C.C. 2d 729 (1987).

[14] Finance Docket No. 28905 (Sub-No. 22), *CSX Corporation—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, 4 I.C.C. 2d 641 (1988); Finance Docket No. 24930 (Sub-No. 20), *Norfolk Southern Corporation—Control—Norfolk and Western Railway Company and Southern Railway Company* (not printed), served May 24, 1988.

[15] *American Train Dispatchers' Association v. Interstate Commerce Commission and United States of America*, 880 F.2d 562 (D.C. Cir. 1989).

[16] *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Ry. v. United States*, 609 I.2d 83 (d Cir. 1979).

[17] *Kansas City Southern Industries, Inc. v. ICC*, Nos. 88-4626 and 88-4706 (5th Cir., argued Sept. 7, 1989). This case reviews two ICC decisions: Finance Docket No. 32000, *Rio Grande Industries, Inc., et al.—Control—Southern Pacific Transportation Co.*, 4 I.C.C. 2d 834 (1988) and Finance Docket No. 31243, *Declaratory Order—Control—Rio Grande Industries, Inc.* (not printed), served Aug. 25, 1988.

[18] The ongoing proceeding before the bankruptcy court is styled *In re Chicago, Missouri & Western Railway Company*, No. 88 B 5141, U.S. Bankruptcy Court, Northern District of Illinois, Eastern Division.

[19] *In the Matter of Chicago, Missouri & Western*, United States District Court for the Northern District of Illinois, Eastern Division, No. 88 C 8009.

where a decision was pending at the close of the fiscal year.[20]

As part of this ongoing proceeding, the bankruptcy court referred the Trustee's proposal to sell CMW's line between East St. Louis and Chicago, Illinois, to the Commission for its approval under 49 U.S.C. 11343-11344. The Commission approved the transaction in a decision served September 29, 1989, which was referred back to the bankruptcy court.[21] Final disposition was pending at the end of the fiscal year.

In a significant rates and practices case having environmental implications, the District of Columbia Circuit[22] reversed the Commission's determination[23] that certain southern and western railroads were engaged in an unreasonable practice and evading their common carrier obligation to transport spent nuclear fuel in regular train service by charging excessively high rates for its transportation. The court also set aside the Commission's alternative finding that the involved railroads had market dominance over such traffic. Under this decision, railroads that do not wish to transport spent nuclear fuel may relieve themselves of the obligation to do so by merely publishing a tariff at rate levels sufficiently high to embargo the traffic.

Also of environmental significance, the Eighth Circuit upheld the constitutionality of the interim trails use statute, 16 U.S.C. 1247(d), against the claims of landowners who held reversionary interests in a railroad right-of-way. Trail-use provisions under the statute allow a railroad considering abandonment of a line to enter into interim trail-use agreements instead of abandonment, thereby rail banking (setting aside for possible future use) its right-of-way. The court agreed that the Tucker Act[24] is available to redress the landowners' claims.[25]

Other rail cases of significance include a decision of the District of Columbia Circuit which upheld the Commission's repeal of a long-standing policy forbidding railroads from exacting a separate charge for the movement of private railcars to and from repair facilities.[26] In its change of policy, the Commission no longer considers the movement of private railcars as a movement of an "instrumentality of transportation" (the charges for which, historically, the rail industry collectively had to absorb as a cost of doing business). Instead, the Commission now considers this type of movement to be one for which a carrier may charge under appropriate circumstances. Additional costs associated with paying for movements to repair facilities may be recoverable by increases in the repair cost element of a mileage allowance formula.

The Commission's success in other significant rail cases was mixed. In one, the Seventh Circuit affirmed the Commission's refusal to require the disclosure of the economic terms of long-term contracts for coal transportation by rail as contrary to the requirement of confidentiality established under 49

[20] *In the Matter of Chicago, Missouri & Western Railway Company*, United States Court of Appeals for the Seventh Circuit, No. 89-2500.

[21] Finance Docket No. 31522, (Sub-Nos. 1-9), *Rio Grande Industries, Inc., et al.—Purchase and Trackage Rights—Chicago, Missouri & Western Railway Company Line Between St. Louis, MO and Chicago, IL*, 5 I.C.C.2d 952 (served Sept. 29, 1989).

[22] *Union Pacific Railroad Company v. ICC*, 867 F.2d 646 (D.C. Cir. 1989).

[23] *Commonwealth Edison Co. v. Aberdeen & Rockfish Railroad*, 2 I.C.C. 2d 642 (1986).

[24] 28 U.S.C. 1491d.

[25] *Glosemeyer v. Conservation Federation Co.*, 879 F.2d 316 (8th Cir. 1989), affirming Docket No. AB-102 (Sub-No. 13), *Missouri-Kansas-Texas Railroad Co.—Aband.—In St. Charles, Warren, Montgomery, Callaway, Boone, Howard and Pettis Counties, MO* (not printed), served March 26, 1987.

[26] *General American Transportation Corp. v. ICC & USA*, 872 F.2d 1084 (D.C. Cir. 1989), *aff'g*, Docket No. 39380, *General American Transp. Corp. et al. v. Baltimore and Ohio Chicago Terminal Railroad Co., et al.*, 3 I.C.C.2d 599 (1987).

U.S.C. 10713.[27] In another, the District of Columbia Circuit reversed and remanded a Commission decision holding that a carrier could not, without prior Commission approval, take increases to prescribed rates under the "zone of rate freedom" (ZORF) provisions of 49 U.S.C. 10707a(c)(1) and (d)(1).[28] The court held that Congress intended to authorize carriers to add profit-enhancing increases to all rates, including prescribed rates (under 49 U.S.C. 10704(a)(1)), and that they could do so without seeking Commission approval.

Finally, the District of Columbia Circuit set aside a portion of a Commission decision finding that states are precluded from regulating a rail spur used in interstate commerce.[29] The court rejected the Commission's argument that under 49 U.S.C. 11501(b)(2) (and other Staggers Act provisions), states regulating any intrastate rail transportation by interstate carriers are bound to apply federal standards. The court found instead that Section 11501(b)(2) addresses only intrastate ratemaking and related matters. A petition for rehearing is pending.

In the motor carrier area, the District of Columbia Circuit upheld the Commission's approval of the application of GLI Acquisition Company, a subsidiary of Greyhound Lines, Inc., to purchase the operating authority and principal assets of Trailways Lines, Inc. The Commission had held that the merger met the statutory requirements of 49 U.S.C. 11343-11344, and that it was not anti-competitive. Moreover, the merger satisfied the antitrust standards under the "failing firm" doctrine.[30]

In an important motor carrier case, the Eighth Circuit affirmed[31] a district court decision upholding a Commission finding that the collection of undercharges would constitute an unreasonable practice.[32] This was the first decision at the Circuit Court level to uphold the Commission's negotiated rates policy for motor carriers.[33] Under that policy, the Commission may find unreasonable a carrier practice of failing to file a negotiated rate, and then attempting to collect charges on the basis of a higher, filed rate. In the past, the Commission strictly enforced collection of the filed rate; it recently changed its policy, however, to acknowledge the failure of many carriers in today's competitive, deregulated environment to file rates and their later efforts, often after bankruptcy, to collect higher charges. That policy is being litigated in numerous cases before the Commission and the courts.

The Commission's assertion of authority over motor carrier transportation was upheld in two cases which further defined "interstate" versus

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[27] *Western Fuels-Illinois, Inc., et al. v. ICC & USA*, No. 88-2505 (7th Cir., July 13, 1989), *aff'g*, Ex Parte No. 387 (Sub-No. 961), *Petition of Western Fuels Association, Inc., et al., For a Rulemaking On Public Disclosure Of Terms Of Long-Term Railroad Coal Transportation Contracts* (not printed), served July 20, 1988.

[28] *CSX Transportation v. United States and ICC*, 867 F.2d 1439 (D.C. Cir. 1989), reversing and remanding Docket No. 36114 and No. 36114 (Sub-No. 1), *Potomac Electric Power Co. v. Consolidated Rail Corp., et al.* (not printed), served October 19, 1987.

[29] *Illinois Commerce Commission v. ICC*, 879 F.2d 917 (D.C. Cir. 1989), *rev'g in part, Chicago & N.W. Transp. Co.—Abandonment Exemption—In McHenry County, IL*, 3 I.C.C.2d 366 (1987).

[30] *Peter Pan Bus Lines, Inc., et al. v. ICC*, D.C. Cir. Nos. 88-1532, 88-1556 and 88-1567 (1989) (unreported), *aff'g*, Docket No. MC-F-18505, *GLI Acquisition Co.—Purchase—Trailways Lines, Inc.* (not printed), served June 7, 1988.

[31] *Maislin Industries and U.S. Inc. v. Primary Steel, Inc.*, 879 F.2d 400 (8th Cir. 1989).

[32] No. MC-C-10961, *Primary Steel, Inc. v. Maislin Industries, U.S. Inc. et al.* (not printed), served January 19, 1988.

[33] *But see Matter of Caravan Refrigerated Cargo, Inc.*, 364 F.2d 388 (5th Cir. 1989), *petition for certiorari pending*, No. 88-1958, filed May 30, 1989, which affirmed a lower court's refusal to refer a negotiated rates issue to the Commission and its determination that a carrier was entitled to undercharges. The Commission did not participate in that litigation, but the Supreme Court has sought the views of the United States regarding the petition for certiorari.

"intrastate" commerce. The Eighth Circuit affirmed the Commission's declaration that movement of certain chemicals from a distribution point in St. Louis, Missouri, to a shipper's customers in that state is not separate intrastate transportation, but rather part of continuing interstate transportation from out-of-state origins to ultimate destinations.[34] Also, the Fifth Circuit affirmed the Commission's declaration that certain shipments of carpet within Texas, under a storage-in-transit provision, and subsequent to a movement from out-of-state, are part of continuing interstate transportation.[35]

Finally, in the area of water carrier transportation, the District of Columbia Circuit set aside a Commission decision[36] finding that a 30-mile water operation between Montauk, New York, and Groton, Connecticut, was a ferry movement, which is generally exempt from regulation under 49 U.S.C. 10544(a)(4).[37] While recognizing that the Commission generally has great latitude in determining the scope of the ferry exemption, and in modifying that exemption from time to time, the court remanded the case to the Commission so that it could explain more clearly its apparent departure from past precedent in narrowly construing the exemption relative to the permissible distance over which a ferry may travel. The matter is currently pending before the Commission on reconsideration.

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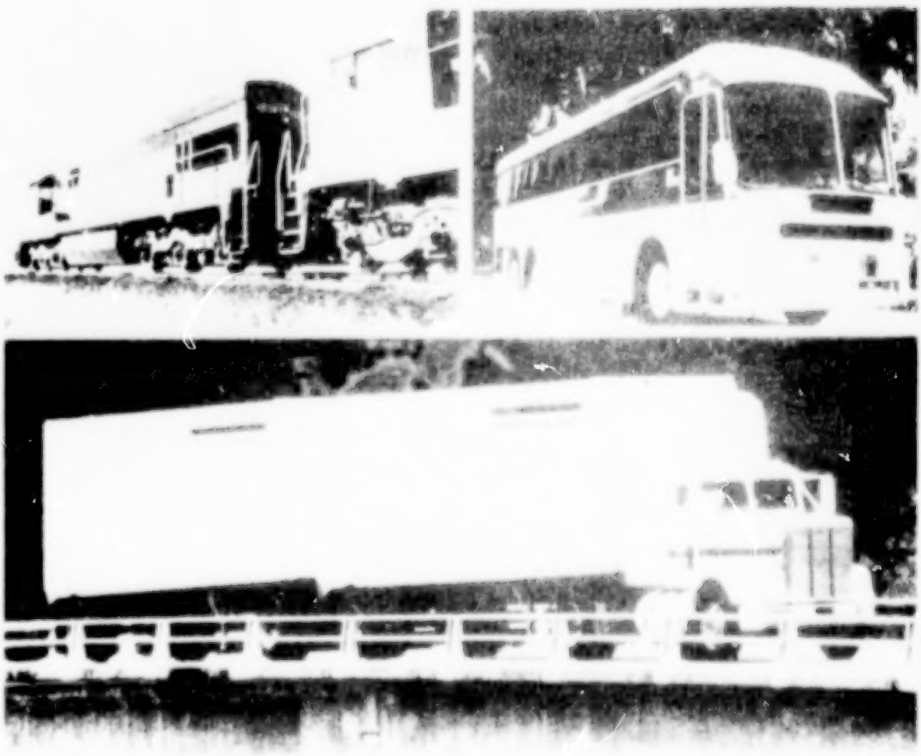
[34] *Middlewest Motor Freight Bureau, et al. v. ICC*, 867 F.2d 458 (8th Cir. 1989), *pet. for cert. pending*, affirming, No. MC-C-10999, *Matlack Inc.—Transportation Within Missouri—Petition for Declaratory Order* (not printed), June 17, 1987.

[35] *State of Texas v. ICC & USA*, 866 F.2d 1546 (5th Cir. 1989), *aff'g*, Docket No. MC-C-10963, *Armstrong World Industries—Transportation Within Texas—Petition for Declaratory Order*, 2 I.C.C.2d 63 (1986).

[36] *Viking Starship, Inc., Common Carrier Application*, 4 I.C.C.2d 634 (1988).

[37] *Cross-Sound Ferry Services, Inc. v. Interstate Commerce Commission*, 873 F.2d 395 (D.C. Cir. 1989).



APPENDIX A

Commission Organization

The major bureaus and offices of the Commission are listed below. Heads of each bureau or office report to the Chairman via the channels indicated on the organization chart.

The list reflects the Commission's organization as of September 30, 1989. For a list of the Commission's current staff, please write or call the Office of Public Affairs, Interstate Commerce Commission, 12th Street and Constitution Avenue, N.W., Room 4111, Washington, D. C. 20423, (202) 275-7252.

STAFF OFFICIALS

Office of the Chairman:
- Chief of Staff ..... David M. Konschnik
- Senior Staff Counsel ..... Kathleen D. Ribaudo

Office of Government and Public Affairs:
- Acting Director ..... Jule R. Herbert, Jr.

Office of Public Assistance:
- Director ..... Samuel E. Eastman
- Deputy Director ..... Dan G. King

Office of Human Relations:
- Director ..... Alexander W. Dobbins

Office of the Inspector General:
- Inspector General ..... James J. McKay

Office of the Managing Director:
- Managing Director ..... Edward E. Guthrie
- Director, Personnel Office ..... Richard H. Mooers
- Chief, Budget and Fiscal Office ..... Anthony Jacobik, Jr.
- Chief, Administrative Services ..... Virgil L. Schultz
- Chief, Systems Development ..... Edward F. Welkener

Office of the Secretary:
- Secretary ..... Noreta R. McGee
- Assistant Secretary ..... Kathleen M. King

Office of the General Counsel:
- General Counsel ..... Robert S. Burk
- Deputy General Counsel ..... Henri F. Rush
- Associate General Counsel ..... Ellen D. Hanson
- Associate General Counsel for Research and Legislation ..... Patricia A. Hahn
- Deputy Associate General Counsel ..... John J. McCarthy, Jr.
- Deputy Associate General Counsel ..... Craig M. Keats

Office of Proceedings:
- Director ..... Jane F. Mackall
- Deputy Director, Section of Railroads ..... Joseph H. Dettmar
- Deputy Director, Section of Motor Carriers ..... Richard B. Felder

Office of Transportation Analysis:
- Director ..... John F. Hennigan, Jr.
- Associate Director ..... Leland L. Gardner
- Chief, Section of Rail Services Planning ..... Michael E. Sullivan
- Chief, Section of Energy and Environment ..... Elaine K. Kaiser
- Chief, Section of Research and Analysis ..... Michael A. Redisch

Office of Hearings:
- Chief Administrative Law Judge ..... Paul S. Cross

Office of Compliance and Consumer Assistance:
- Director ..... Bernard Gaillard
- Associate Director ..... William J. Love
- Deputy Director, Section of Operations ..... Heber P. Hardy
- Deputy Director, Section of Enforcement ..... Charles E. Wagner

Bureau of Accounts:
- Director ..... Daniel D. Campbell
- Chief, Section of Audit and Accounting ..... William F. Moss
- Chief, Section of Financial Analysis ..... Ward L. Ginn, Jr.
- Chief, Section of Rail Costing ..... William T. Bono
- Chief, Accounting and Valuation Board ..... William F. Moss

Bureau of Traffic:
- Director ..... Neil S. Llewellyn
- Chief, Section of Rates and Informal Cases ..... Lawrence C. Herzig
- Chief, Section of Tariffs ..... Charles E. Langyher, III

DIRECTORY OF INTERSTATE COMMERCE COMMISSION FIELD OFFICES AND REGIONAL HEADQUARTERS

Eastern Region

Regional Headquarters.....Richard M. Biter
Regional Director
Room 16400
3535 Market St.
Philadelphia, PA 19104

Atlanta.....Suite 638
Pershing Point Bldg.
1371 Peachtree St., N.E.
Atlanta, GA 30309

Baltimore.....1025 Fallon Federal Bldg.
Charles Center
31 Hopkins Plaza
Baltimore, MD 21201

Boston.....Room 1015
Boston Federal Office Bldg.
10 Causeway St.
Boston, MA 02222

Charlotte.....Room CC-516
Mart Office Bldg.
800 Briar Creek Rd.
Charlotte, NC 28205

Cleveland.....Room 913
Celebrezze Federal Bldg.
1240 E. 9th St.
Cleveland, OH 44119

Jacksonville.....Suite 233
4057 Carmichael Ave.
Jacksonville, FL 32207

New York.....Room 1807
Jacob K. Javits Federal Bldg.
26 Federal Plaza
New York, NY 10278

DIRECTORY OF INTERSTATE COMMERCE COMMISSION FIELD OFFICES AND REGIONAL HEADQUARTERS–Continued

Central Region

Regional Headquarters.....William Redmond, Jr.
Regional Director
Room 1304
Everett McKinley Dirksen Bldg.
219 S. Dearborn St.
Chicago, IL 60604

Fort Worth.....Suite 510
411 W. 7th St.
Ft. Worth, TX 76102

Indianapolis.....Room 429
Federal Bldg. & U.S. Courthouse
46 E. Ohio St.
Indianapolis, IN 46204

Kansas City.....2111 Federal Bldg.
911 Walnut St.
Kansas City, MO 64106

Minneapolis.....Room 475
Federal Bldg. and U.S. Courthouse
110 S. 4th St.
Minneapolis, MN 55401

New Orleans.....T-3015 Federal Bldg. and
U.S. Post Office
701 Loyola Ave.
New Orleans, LA 70113

Omaha.....Room 728
Federal Office Bldg.
106 S. 15th St.
Omaha, NE 68102

St. Louis.....Room 1161
210 N. Tucker Blvd.
St. Louis, MO 63101

DIRECTORY OF INTERSTATE COMMERCE COMMISSION FIELD OFFICES AND REGIONAL HEADQUARTERS–Continued

Western Region

Regional Headquarters	John H. Kirkemo Regional Director Suite 500 211 Main St. San Francisco, CA 94105
Denver	Room 440, Drawer #3549 Federal Office Bldg. 1961 Stout St. Denver, CO 80294
Los Angeles	Suite 304 360 E. 2nd St. Los Angeles, CA 90012
Phoenix	3415 Federal Bldg. 230 N. 1st Ave. Phoenix, AZ 85025
Salt Lake City	2419 Federal Bldg. 125 State St. Salt Lake City, UT 84138
Seattle	858 Federal Bldg. 915 2nd Ave. Seattle, WA 98174

INTERSTATE COMMERCE COMMISSIONERS
1887-1990

Interstate Commerce Commissioners	State	Party	Oath of Office	End of Service
1. COOLEY, Thomas M.	Mich.	Rep.	Mar. 31, 1887	Jan. 12, 1892
2. MORRISON, William R.	Ill.	Dem.	Mar. 31, 1887	Dec. 31, 1897
3. SCHOONMAKER, Augustus	N.Y.	Dem.	Mar. 31, 1887	Dec. 31, 1890
4. WALKER, Aldace F.	Vt.	Rep.	Mar. 31, 1887	Mar. 31, 1889
5. BRAGG, Walter L.	Ala.	Dem.	Mar. 31, 1887	Aug. 21, 1891
6. VEAZEY, Wheelock G.	Vt.	Rep.	Sept. 10, 1889	Dec. 20, 1896
7. KNAPP, Martin A.	N.Y.	Rep.	Mar. 2, 1891	Dec. 12, 1910
8. McDILL, James W.	Iowa	Rep.	Jan. 13, 1892	Feb. 28, 1894
9. CLEMENTS, Judson C.	Ga.	Dem.	Mar. 17, 1892	June 18, 1917
10. YEOMANS, James D.	Iowa	Dem.	May 2, 1894	Mar. 6, 1905
11. PROUTY, Charles A.	Vt.	Rep.	Dec. 21, 1896	Feb. 2, 1914
12. CALHOUN, William J.	Ill.	Rep.	Mar. 21, 1898	Sept. 30, 1899
13. FIFER, Joseph W.	Ill.	Rep.	Nov. 4, 1899	Dec. 30, 1905
14. COCKRELL, Francis M.	Mo.	Dem.	Mar. 11, 1905	Dec. 31, 1910
15. LANE, Franklin K.	Calif.	Dem.	July 2, 1906	Mar. 5, 1913
16. CLARK, Edgar E.	Iowa	Rep.	July 31, 1906	Aug. 13, 1921
17. HARLAN, James S.	Ill.	Rep.	Aug. 28, 1906	Dec. 31, 1918
18. McCHORD, Charles C	Ky.	Dem.	Dec. 31, 1910	Jan. 1, 1926
19. MEYER, Balthasar H.	Wis.	Rep.	Dec. 31, 1910	Apr. 30, 1939
20. MARBLE, John H.	Calif.	Dem.	Mar. 10, 1913	Nov. 21, 1913
21. HALL, Henry C.	Colo.	Dem.	Mar. 21, 1914	Jan. 13, 1928
22. DANIELS, Winthrop M.	N.J.	Dem.	Apr. 6, 1914	July 1, 1923
23. AITCHISON, Clyde B.	Oreg.	Rep.	Oct. 5, 1917	July 10, 1952
24. WOOLLEY, Robert W.	Va.	Dem.	Oct. 5, 1917	Dec. 31, 1920
25. ANDERSON, George W.	Mass.	Dem.	Oct. 15, 1917	Nov. 5, 1918
26. EASTMAN, Joseph B.	Mass.	Ind.	Feb. 17, 1919	Mar. 15, 1944
27. FORD, Henry J.[1]	N.J.	Dem.	June 11, 1920	Mar. 4, 1921
28. POTTER, Mark W.	N.Y.	Dem.	June 24, 1920	Feb. 20, 1925
29. ESCH, John J.	Wis.	Rep.	Mar. 28, 1921	May 29, 1928
30. CAMPBELL, Johnston B.	Wash.	Rep.	May 5, 1921	Jan. 6, 1930
31. LEWIS, Ernest I.	Ind.	Rep.	May 5, 1921	Dec. 31, 1932
32. COX, Frederick I.	N.J.	Rep.	Sept. 1, 1921	Dec. 31, 1926
33. McMANAMY, Frank	D.C.	Dem.	June 28, 1923	Apr. 30, 1939
34. WOODLOCK, Thomas F.	N.Y.	Dem.	Apr. 1, 1925	Aug. 31, 1930
35. TAYLOR, Richard V.	Ala.	Dem.	Jan. 16, 1926	Dec. 31, 1929
36. BRAINERD, Ezra, Jr.	Okla.	Rep.	Feb. 23, 1927	Dec. 31, 1933
37. PORTER, Claude R.	Iowa	Dem.	Jan. 28, 1928	Aug. 17, 1946
38. FARRELL, Patrick J.	D.C.	Dem.	June 7, 1928	Dec. 31, 1934
39. LEE, William E.	Idaho	Rep.	Jan. 18, 1930	Aug. 18, 1953

Interstate Commerce Commissioners	State	Party	Oath of Office	End of Service
40. TATE, Hugh M.	Tenn.	Rep.	Feb. 28, 1930	Sept. 16, 1937
41. MAHAFFIE, Charles D.	D.C.	Dem.	Sept. 2, 1930	Dec. 31, 1954
42. MILLER, Carroll	Pa.	Dem.	June 14, 1933	Dec. 24, 1949
43. SPLAWN, Walter M.W.	Tex.	Dem.	Feb. 1, 1934	June 30, 1953
44. CASKIE, Marion M.	Ala.	Dem.	Aug. 26, 1935	Mar. 31, 1940
45. ROGERS, John L.	Tenn.	Rep.	Sept. 16, 1937	Apr. 30, 1952
46. ALLDREDGE, J. Haden	Ala.	Dem.	May 1, 1939	Oct. 31, 1955
47. PATTERSON, William J.	N.D.	Ind.	July 31, 1939	July 10, 1953
48. JOHNSON, J. Monroe	S.C.	Dem.	June 3, 1940	June 4, 1956
49. BARNARD, George M.	Ind.	Rep.	Dec. 2, 1944	Jan. 2, 1949
50. MITCHELL, Richard F.	Iowa	Dem.	Feb. 3, 1947	June 15, 1959
51. CROSS, Hugh W.	Ill.	Rep.	Apr. 11, 1949	Nov. 25, 1955
52. KNUDSON, James K.	Utah	Rep.	Apr. 20, 1950	May 22, 1954
53. ELLIOTT, Kelso	Ind.	Rep.	July 10, 1952	Feb. 29, 1956
54. ARPAIA, Anthony F.	Conn.	Dem.	July 11, 1952	Mar. 15, 1960
55. CLARKE, Owen	Wash.	Rep.	July 10, 1953	Jan. 15, 1958
56. FREAS, Howard G.	Calif.	Rep.	Aug. 18, 1953	Dec. 31, 1966
57. TUGGLE, Kenneth H.	Ky.	Rep.	Sept. 8, 1953	July 31, 1975
58. WINCHELL, John H.	Colo.	Rep.	July 28, 1954	Apr. 3, 1961
59. HUTCHINSON, Everett	Tex.	Dem.	Feb. 1, 1955	Mar. 31, 1965
60. MURPHY, Rupert L.	Ga.	Dem.	Dec. 30, 1955	Aug. 31, 1978
61. MINOR, Robert W.	Ohio	Rep.	Feb. 15, 1956	Sept. 30, 1958
62. WALRATH, Laurence K.	Fla.	Dem.	Mar. 29, 1956	June 30, 1972
63. McPHERSON, Donald P., Jr	Pa.	Rep.	June 4, 1956	Mar. 29, 1963
64. GOFF, Abe McGregor	Idaho	Rep.	Feb. 12, 1958	July 30, 1967
65. WEBB, Charles A.	Va.	Rep.	Sept. 30, 1958	Mar. 31, 1967
66. HERRING, Clyde E.	Iowa	Dem.	Sept. 21, 1959	May 25, 1964
67. BUSH, John W.	Ohio	Dem.	Apr. 3, 1961	Nov. 2, 1972
68. TUCKER, William H.	Mass.	Dem.	Apr. 3, 1961	Dec. 31, 1967
69. TIERNEY, Paul J.	Md.	Rep.	Mar. 29, 1963	Feb. 28, 1970
70. BROWN, Virginia Mae	W.Va.	Dem.	May 25, 1964	July 23, 1979
71. DEASON, Willard	Tex.	Dem.	Sept. 8, 1965	July 31, 1975
72. STAFFORD, George M.	Kans.	Rep.	Apr. 26, 1967	Aug. 31, 1980
73. SYPHERS, Grant E.	Calif.	Rep.	July 31, 1967	Feb. 5, 1968
74. HARDIN, Dale W.	Ill.	Rep.	July 31, 1967	Aug. 31, 1977
75. BURKE, Wallace R.	Conn.	Dem.	Aug. 21, 1968	June 28, 1969
76. JACKSON, Donald L.	Calif.	Rep.	Mar. 20, 1969	June 30, 1972
77. GRESHAM, Robert C.	Md.	Rep.	Dec. 15, 1969	June 18, 1982
78. BREWER, W. Donald	Colo.	Rep.	July 23, 1970	June 30, 1974
79. WIGGIN, Chester M., Jr.	N.H.	Rep.	Oct. 24, 1972	July 31, 1973
80. McFarland, Alfred T.	Tenn.	Ind.	Nov 1, 1972	Nov. 10, 1977
81. MONTEJANO, Rodolfo[1]	Calif.	Dem.	Nov. 3, 1972	Mar. 2, 1973
82. O'NEAL, A. Daniel, Jr.	Wash.	Dem.	Apr. 12, 1973	Dec. 31, 1979
83. CLAPP, Charles L.	Mass.	Rep.	Mar. 14, 1974	Mar. 19, 1982

[1] Recess appointment only, not confirmed.

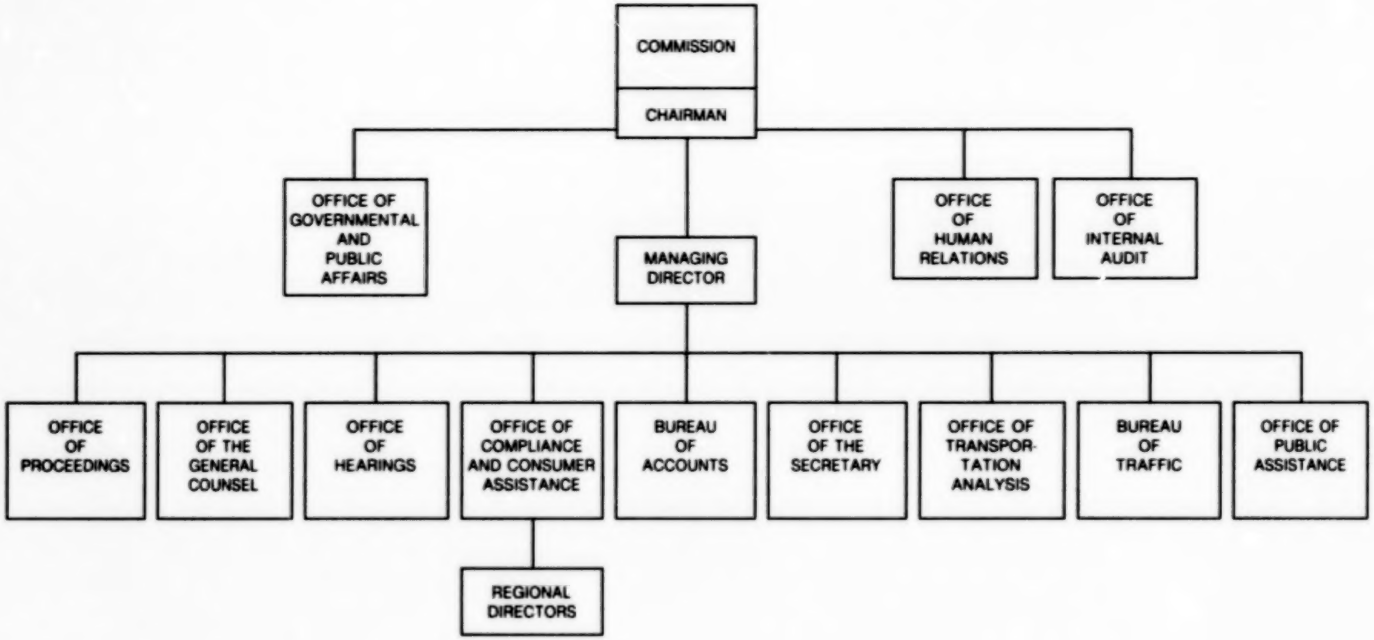
Interstate Commerce Commissioners	State	Party	Oath of Office	End of Service
84. CORBER, Robert J.	Va.	Rep.	Mar. 13, 1975	Dec. 1, 1976
85. CHRISTIAN, Betty Jo	Tex.	Dem.	Apr. 7, 1976	Dec. 31, 1979
86. TRANTUM, Thomas A.	Conn.	Rep.	July 23, 1979	July 31, 1981
87. GASKINS, Darius W.	D.C.	Dem.	July 23, 1979	Feb. 1, 1981
88. ALEXIS, Marcus	Ill.	Dem.	Aug. 27, 1979	June 30, 1981
89. GILLIAM, Reginald E.	Va.	Dem.	Apr. 21, 1980	Feb. 1, 1983
90. TAYLOR, Reese H., Jr.	Nev.	Rep.	June 25, 1981	Dec. 31, 1985
91. STERRETT, Malcolm M.B.	Md.	Rep.	Feb. 12, 1982	Aug. 11, 1988
92. ANDRE, Frederic N.	Ind.	Rep.	Mar. 19, 1982	Nov. 21, 1989
93. SIMMONS, J.J. III [2,3]	Okla.	Dem.	Apr. 27, 1982 Sept. 10, 1984	Feb. 28, 1983
94. GRADISON, Heather J.	Ohio	Rep.	June 18, 1982	Feb. 12, 1990
95. LAMBOLEY, Paul H.[2]	Nev.	Dem.	Sept. 11, 1984	
96. STRENIO, Andrew J., Jr.	Md.	Dem.	Sept. 14, 1984	Dec. 31, 1985
97. PHILLIPS, Karen B.[2]	Va.	Rep.	Aug. 11, 1988	
98. EMMETT, Edward M.[2]	Tex.	Rep.	Nov. 21, 1989	
99. PHILBIN, Edward J.[2]	Cal.	Rep.	Feb. 12, 1990	

[2] Currently serving.

[3] Commissioner Simmons resigned as a Commission member in February 1983 following his confirmation as Under Secretary of the Department of the Interior. He rejoined the Commission in September 1984 following his Presidential appointment and Senate confirmation.

INTERSTATE COMMERCE COMMISSION

Organizational Chart



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APPENDIX B

Commission Workload

Table 1.—Distribution by method of disposition of Office of Proceedings cases opened and closed during fiscal year 1989.

Motor Matters

Case Type	Open-ings	Closings			
		Opposed	Un-opposed	Dismissed Rejected/ With-drawn	Total
Rulemakings	13	9	5	0	14
Motor property licensing:					
Initial common	3,802	12	3,539	80	3,631
Initial contract	7,107	131	6,837	166	7,134
Extension common	522	5	472	61	538
Extension contract	541	89	477	71	637
Motor passenger licensing:					
Initial common	631	3	601	9	613
Initial contract	95	1	80	1	82
Extension common	66	4	65	5	74
Extension contract	11	0	8	2	10
Passenger carrier exit	1	1	0	0	1
Water carrier licensing	9	0	7	2	9
Freight forwarder licensing	47	0	30	12	42
Property broker licensing:					
Initial	2,975	5	2,744	25	2,774
Extension	34	0	44	1	45
Motor carrier complaints:					
Rate: Ex Parte MC-177	92	33	0	10	43
Interstate/intrastate	2	4	2	1	7
Other	15	6	5	7	18
Restriction removal	6	0	1	5	6
Investigation & suspension	4	8	0	0	8
Motor rate	42	27	8	0	35
Passenger rate review	1	0	1	0	1
Motor carrier finance	226[1]	9	210	21	240
Small carrier transfer	673	2	653	32	687
Motor finance temporary authority	69	0	67	2	69
Rate bureau	0	2	6	6	14[2]
Other motor matters	4	0	4	1	5
Total	16,988	351	15,866	520	16,737

[1] Includes 211 exemptions according to docket Ex Parte No. 55 (Sub-No. 57).

[2] The Commission granted final approval in eight proceedings and revoked the antitrust immunity in six other proceedings. The Commission also provisionally approved agreements in eight proceedings, continued provisional approval in three others, and modified conditions previously imposed in one other proceeding.

Rail Matters

Case Type	Openings[1]	Pending	Decisions[2]	
			Procedural	Substantive
Rulemaking	12	33	15	50
Abandonments (non-NERSA)[3]	30	7	50	124
Abandonments (Conrail under NERSA)	5	2	0	7
Abandonment exemptions[4]	163	32	2[illegible]	374
Rates: Complaints, declaratory orders, investigations and rate bureau activity	13	36	78	41
Investigation and suspensions	2	1	4	3
Exemptions	2	0	0	4
Finance docket: exemptions	166	28	28	207
Finance docket: other[5]	57	44	37	68
Total	450	183	235	878

[1] Excludes filings rejected by letter, reopenings, and court remands.

[2] Where a single decision [illegible] embraced proceedings, that decision is counted only once. Ministerial corrections, notices of court action, or miscellaneous notices are not included in these totals.

[3] North East Rail Service Act.

[4] Includes petitions and notices of exemption.

[5] Includes mergers and consolidations, feeder-line acquisitions, arbitration review proceedings, petitions seeking declaratory orders, and other financial transactions.

Table 2.—Informal Proceedings

	Fiscal Year 1987	Fiscal Year 1988	Fiscal Year 1989
Applications for motor temporary authority			
Filed	3,172	3,538	3,976
Disposed of	3,155	3,552	3,986
Pending at end of year	184	170	160
Petitions in applications for motor temporary authority (received at ICC headquarters)			
Filed	8	8	2
Disposed of	8	7[1]	3
Pending at end of year	0	1	0

[1] The 1988 Annual Report incorrectly indicated 8.

Table 3.—Abandonments, Construction, Acquisitions and Operations, Consolidations, Trackage Rights, and Leases

	Fiscal Year 1987		Fiscal Year 1988		Fiscal Year 1989	
	Number	Miles	Number	Miles	Number	Miles
1. Abandonments:						
Applications filed	60	1,208	50	1,470	35	809
Granted	60	818	47	1,293	35	699
Denied	2	32	3	33	2	76
Dismissed	3	196	5	90	8	309
Dismissed because of sale	8	72	4	110	4	84
Petitions for exemptions filed	73	817	46	737	50	616
Granted	88	976	43	807	42	587
Denied	0	0	0	0	0	0
Dismissed	5	28	3	33	3	30
Dismissed because of sale	0	0	0	0	0	0
Notices of exemptions filed	50	476	84	1,183	113	1,084
Granted	27	138	71	897	103	946
Dismissed	2	37	13	298	16	139
Dismissed because of sale	0	0	0	0	0	7[1]
2. Construction:						
Applications filed	0	0	0	0	1	1
Granted	1	58	0	0	1	1
Denied	0	0	0	0	0	0
Dismissed	0	0	0	0	0	0
Petitions for exemptions filed	N/A	N/A	3	0	2	9
Granted	N/A	N/A	0	0	2	8
Denied	N/A	N/A	0	0	0	0
Dismissed	N/A	N/A	0	0	2	2

[1] This line segment was a portion of a line approved for abandonment. The case is counted as a "grant" above.

Table 3 (Cont'd)—Abandonments, Construction, Acquisitions and Operations, Consolidations, Trackage Rights, and Leases

	Fiscal Year 1987		Fiscal Year 1988		Fiscal Year 1989	
	Number	Miles	Number	Miles	Number	Miles
3. Acquisitions and Operations: under 49 U.S.C. 10901						
Applications filed	0	0	0	0	0	0
Granted	0	0	0	0	0	0
Denied	0	0	0	0	0	0
Dismissed	0	0	0	0	0	0
Notices of exemptions filed	N/A	N/A	58	2,822	40	1,193
Granted	N/A	N/A	58	5,581	42	1,538
Dismissed	N/A	N/A	1	13	3	29
4. Consolidations and Acquisitions: under 49 U.S.C. 11343						
Applications filed	N/A	N/A	6	15,174	14	N/A
Granted	N/A	N/A	3	14,998	8	N/A
Denied	N/A	N/A	3	N/A	0	0
Dismissed	N/A	N/A	0	0	1	55
Petitions for exemptions filed	N/A	N/A	19	1,264	26	N/A
Granted	N/A	N/A	17	1,617	28	N/A
Denied	N/A	N/A	0	0	0	0
Dismissed	N/A	N/A	0	0	0	0
5. Trackage Rights:[2]						
Applications filed	N/A	N/A	7	N/A	16	N/A
Granted	N/A	N/A	3	N/A	6	108
Denied	N/A	N/A	16	N/A	4	N/A
Dismissed	N/A	N/A	1	N/A	0	0
6. Leases:						
Applications filed	N/A	N/A	0	0	2	259
Granted	N/A	N/A	0	0	1	259
Denied	N/A	N/A	0	0	0	0
Dismissed	N/A	N/A	0	0	0	0
Petitions for exemptions filed	N/A	N/A	N/A	N/A	16	975
Granted	N/A	N/A	N/A	N/A	12	670
Denied	N/A	N/A	N/A	N/A	0	0
Dismissed	N/A	N/A	N/A	N/A	1	5

[2] Includes formal applications and petitions for exemption.

Table 4.—Tariff Schedules, Fiscal Year 1989

	Received	Criticized	Rejected
Freight			
Common Carrier Tariffs:			
Rail	65,712	99	182
Motor	1,062,473	3,412	3,560
Water	33,078	18	92
Freight Forwarder	197	7	23
International ocean-land intermodal	84,886	0	1
Total	**1,246,346**	**3,536**	**3,858**
Contract Carrier Filings:			
Rail contracts	32,464	216	39
Rail summaries	35,266	2,207	39
Total	**67,730**	**2,423**	**78**
Passenger Tariffs:			
Rail	2	0	0
Motor	2,787	83	60
Water	89	0	0
Total	**2,878**	**83**	**60**
Grand total	**1,316,954**	**6,042**	**3,996**

Table 5.—Action taken on proposals (protested and non-protested) considered for suspension and/or investigation.

Suspensions—Fiscal Year 1989						
	Rail	Motor	Water	Pipe-line	Total	Per-cent
Suspended	2	3	1	0	6	13
*Not suspended or investigated	7	19	1	1	28	61
*Not suspended but investigated	4	2	0	0	6	13
**Otherwise disposed of	1	5	0	0	6	13
Total	**14**	**29**	**2**	**1**	**48**	**100**

*Permitted to become effective.
**Proposed provisions canceled or rejected; protests withdrawn or filed too late.

Table 6.—Informal Rate Cases Branch (Bureau of Traffic—Fiscal Year 1989)

Rate cases general:	
On hand at beginning of year	117
Received during year	5,379
Disposed of during year	5,349
Pending at end of year	147
Informal complaints and statements of claimed damages:	
On hand at beginning of year	3
Received during year	1
Disposed of during year	4
Pending at end of year	0
Special docket cases:	
On hand at beginning of year	8
Received during year	483
Disposed of during year	458
Pending at end of year	33

Table 7.—ICC Unit Of The National Defense Executive Reserve (NDER)

NDER Group	Fiscal Year 1987 On Roll	Fiscal Year 1988 On Roll	Fiscal Year 1989 On Roll
Rail	388	383	328
Motor	99	94	86
Water	28	28	23

Table 8.—Car Supply—Cars Installed, Retired, and Ordered, Class I Railroads

	Fiscal Year			
	1974	1979	1984	1989
Cars Installed:				
Box	13,738	8,591	0	293
Refrigerator	6,298	247	128	0
Gondola	1,360	1,860	0	2,981
Hopper	4,076	12,373	175	663
Covered Hopper	10,275	5,611	591	2,052
Flat	2,532	2,524	249	54
Other	643	102	85	0
Total Cars	**34,711**	**31,308**	**1,228**	**6,043**
Cars Retired:				
Box	23,854	16,444	23,697	13,079
Refrigerator	716*	4,006	2,948	1,923
Gondola	6,096	4,874	6,080	5,005
Hopper	19,009	12,920	13,854	8,584
Covered Hopper	2,859	1,674	4,463	*2,538
Flat	3,583*	561	249*	1,026
Other	1,295	1,244	1,783	1,408
Total Cars	**48,954**	**41,723**	**52,576**	**28,487**
Cars Ordered:				
Box	8,665	9,927	0	0
Refrigerator	1,548	220	128	0
Gondola	7,512	4,754	250	1,010
Hopper	17,129	12,103	175	1,336
Covered Hopper	5,520	6,754	591	25
Flat	2,376	2,408	227	54
Other	392	90	85	0
Total Cars	**43,165**	**37,068**	**1,456**	**2,425**

*Negative retirement indicates increase in ownership, in transfer of equipment, or excess of new installations, resulting from reclassification or transfer of equipment, or purchase or lease of used equipment.

Table 9.—Ownership, Serviceable Ownership, and Turnaround Time, Class I Railroads

	Fiscal Year			
	1974	1979	1984	1989
Ownership:				
Plain Box	323,078	213,471	114,635	57,581
Equipped Box	175,603	168,461	137,467	82,717
Total Box	**498,681**	**381,932**	**252,102**	**140,298**
Refrigerator	94,074	65,708	51,621	37,405
Gondola	179,089	155,136	124,320	87,881
Hopper	351,414	326,945	272,442	187,869
Covered Hopper	152,145	164,065	160,783	153,152
Flat	101,330	99,082	84,938	84,851
Other	38,839	28,306	20,617	11,661
Total Cars	**1,415,572**	**1,221,174**	**966,823**	**703,117**
Serviceable Cars:				
Plain Box	293,784	188,309	96,118	50,227
Equipped Box	162,526	150,092	113,804	71,628
Total Box	**456,310**	**338,401**	**209,992**	**121,855**
Refrigerators	89,656	60,840	46,418	33,338
Gondolas	169,406	143,102	114,384	80,561
Hoppers	331,869	310,504	253,953	174,624
Covered Hoppers	145,937	154,586	147,334	144,366
Flat	95,973	92,311	80,245	81,677
Others	37,305	26,816	19,102	10,587
Total Cars	**1,326,456**	**1,126,560**	**871,358**	**647,008**
	Calender Year			
	1973	1978	1983	1988
Turnaround Time—Days:				
Box	22.56	28.85	41.7	33.9
Refrigerators	33.01	34.26	49.3	40.6
Gondolas	17.76	22.11	22.6	14.7
Hoppers	13.53	16.38	16.8	12.0
Covered Hoppers	21.16	24.12	30.8	25.3
Flat	12.20	14.16	13.7	9.3
Average, All Cars	**16.74**	**22.15**	**24.8**	**17.0**

Table 10.—Extension of Time Limits Under Section 10327(k)—Rail Proceedings, Fiscal Year 1988

Proceeding	Type	Notification of Extension	Reason and Duration
No. 40068, Shenongo Inc., et al. v. Pittsburgh, Chartiers & Youghiogheny Railway Co.	Complaint	June 28, 1989	90-day extension to facilitate settlement discussions.
No. 38301S, Coal Trading Corporation, et al. v. Baltimore & Ohio Railroad et al.	Complaint	August 1, 1989	150-day extension to consider complex legal issues.

APPENDIX C

PUBLICATIONS

The Commission issues many publications of general interest as well as those directed to the consumer. The Commission additionally issues technical and statistical publications dealing with transportation regulation.

Publications followed by an asterisk may be purchased from the Government Printing Office. For convenience, the GPO Stock number has been included. Price information may be obtained by contacting:

Superintendent of Documents
Government Printing Office
Washington, D.C. 20402
Telephone (202) 783-3238

Publications without an asterisk may be obtained free of charge by writing to the ICC office listed after the title.

- Bureau of Accounts (AC)
  Interstate Commerce Commission
  Washington, D.C. 20423
- Office of Compliance and Consumer Assistance (OCCA)
  Interstate Commerce Commission
  Washington, D.C. 20423
- Office of Government and Public Affairs (OGPA)
  Interstate Commerce Commission
  Washington, D.C. 20423
- Office of Secretary (SE)
  Publications Room (Rm. B-221)
  Interstate Commerce Commission
  Washington, D.C. 20423
- Office of Transportation Analysis (OTA)
  Interstate Commerce Commission
  Washington, D.C. 20423
- Office of Public Assistance (OPA)
  Interstate Commerce Commission
  Washington, D.C. 20423

ANNUAL REPORTS OF COMPANIES

These reports may be examined in the Bureau of Accounts' Public Reference Room, Room 3378, from 8:30 a.m. to 5:00 p.m. weekdays. Photocopies of these reports, at a cost of 60 cents per page, with a $3.00 minimum charge per order, may be obtained by writing to the Office of the Secretary, Room 2215, ICC, Washington, D.C. 20423.

COMMISSION DECISIONS

Individual copies of the Commission's decision may be obtained up to one year from the date of service from Dynamic Concepts, Inc. (DCI), Room 2229, ICC, Washington, D.C. 20423, or by calling (202) 289-4357 or 289-4359. Printed reports in the "ICC" and "MCC" series are also available from the Commission's Publications Room while supplies last. Printed reports in the "ICC 2nd Series" only are available through DCI.

CONSUMER PUBLICATIONS

OCP-100 When You Move: Your Rights and Responsibilities—OCCA

This booklet explains consumer rights when moving household goods across state lines.

GENERAL PUBLICATIONS

Annual Reports of the Commission to Congress

101st 1987 (026-000-01258-9)*
102nd 1988 (026-000-01267-8)*

Code of Federal Regulations, Title 49, Revised to October 1987

Parts 1000-1199: General provisions, enforcement, motor carriers, freight forwarders, intermodal transportation, rules of practice, railroad consolidation, finance and reorganization special procedures.
(022-003-94228-9)*

Parts 1200-End: Uniform system of accounts, preservation of records, reports, valuation, handling of national security information and classified material, passenger and freight tariffs and schedules, credit regulations and general

Interstate Commerce Act

Available from the Government Printing Office in U.S. Code, 49 U.S.C. Sec. 10101 et seq.*

ICC Register

A daily summary of motor carrier applications and of decisions and notices issued by the ICC. Subscription information is available from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402. Telephone (202) 783-3238.

INFORMATIONAL PUBLICATIONS

Before You Start a Small Railroad: A Brief Overview of Things to Consider—OPA (September 1988)

Department of Transportation and State Regulations—Bulletin No. 9—OPA

Fees for Various and Related Services of the Interstate Commerce Commission—OPA (October 1988)

Guide to Applying for Permanent Operating Authority: Passengers—OPA (May 1988)

Guide to Applying for Permanent Authority: Property—OPA (June 1989)

Guide to Applying for Temporary or Emergency Temporary Operating Authority—OPA (February 1988)

Public Participation in Interstate Commerce Commission Cases Under the Bus Regulatory Reform Act of 1982—OPA

Public Participation in Rail Abandonment Cases Under the Interstate Commerce Act—OPA (December 1986)

Illegal Lumping—OCCA

Addresses illegal "lumper" practices

Lease-Purchase Plans—OPA

Small Carrier Transfer and Name Change Procedures—OPA (December 1988)

So You Want to Start a Small Railroad—ICC Small Railroad Application Procedures—OPA (August 1987)

Speeches and Statements—OGPA

ICC Commissioner's speeches or statements before Congressional committees may be obtained on an individual basis from the Office of Government and Public Affairs, Room 4111, ICC, Washington, D.C. 20423. Telephone (202) 275-7252.

State Regulatory Commissions and Fuel Tax Divisions—OPA (June 1989)

Semiannual Office of Inspector General Reports

Photocopies of these reports are available at a cost of 60 cents per page, with a minimum charge per order, from the Office of the Secretary,$3.00, Room 1312, ICC, Washington, D.C. 20423 Telephone (202) 275-1295.

SPECIALIZED PUBLICATIONS

Motor

Customer Pickup of Food and Grocery Products Under Section 8 of the Motor Carrier Act of 1980—OTA

Minority and Female Motor Carrier Profile—OPA (October 1986)

Minority and Female Motor Carrier Profile—OPA (October 1989)

Staff Reports No. 11—Highlights of Activity in the Property Motor Carrier Industry—OTA

Transport Statistics in the U.S. Motor Carriers—SE

(First Release, Part 2, 1986)
(Second Release, Part 2, 1986)

Rail

Class I Line-Haul Railroads, Selected Earnings Data—SE (Quarterly)

Effects of the Boxcar Exemption—OTA

Railroad TOFC/COFC Monitoring Study—OTA (December 1985)

Rail Rates Experience Multi-Year Decline—OTA (April 1989)

A Survey of Shipper Satisfaction with Service and Rates of Shortline and Regional Railroad—Joint Staff Study—OTA (August 1989)

"Transportation: Trucking Services" as appearing in *U.S. Industrial Outlook*—OTA (1989)

Effects of the Boxcar Exemption—OTA (November 1988)

Report of Railroad Employment Class I Line-Haul Railroads—SE

Wage Statistics of Class I Railroad in the U.S.—SE

Statement No. M-350 (monthly)

Transport Statistics in the U.S.: Railroads (First Release, 1986)—SE

Statement No. A-300 (Calendar 1987)

URCS—Uniform Railroad Costing System, 1980 Railroads Cost Study—AC

Technical documentation and explanation of the Uniform Railroad Costing System (December 1982)

URCS—Uniform Railroad Costing System, 1980 Rail Carload Cost Scales—AC

Documentation and regional data for manual calculations under the Uniform Railroad Costing System (April 1983)

URCS—Uniform Railroad Costing System, Phase II, Movement Costing Program User's Manual—AC

Description of the independent interactive computer program for estimating cost of specific, individual rail movements (November 1989)

URCS—Uniform Railroad Costing System, Phase II, Movement Costing Program Technical Manual—AC

Description of Fortran costing programs compatible to Data General Corporation (DEC) and IBM equipment (April 1983)

General

The Commission's Bureau of Accounts publishes quarterly reports on selected earnings data—AC

- *Large Class I Motor Carriers of Property;*
- *Large Class I Motor Carriers of Passengers; and*
- *Large Class I Household Carriers*

APPENDIX D

Appropriations and Employment

The following statement shows average full-time employment and total appropriations for the fiscal years 1955 to 1989 for activities included under the current appropriation title "Salaries and Expenses."

Year	Appropriation	Average Employment	Year	Appropriation	Average Employment
1955 ..	11,679,655	1,859	1973 ..	33,720,000	1,765
1956...	12,896,000	1,902	1974 ..	40,681,000	1,874
1957 ..	14,879,696	2,090	1975 ..	44,970,000	1,986
1958 ..	17,412,375	2,238	1976 ..	52,455,000	2,034
1959 ..	18,747,800	2,268	TQ	12,290,000	2,113
1960 ..	19,650,000	2,344	1977 ..	60,786,000	2,084
1961 ..	21,451,500	2,386	1978 ..	65,575,000	2,040
1962 ..	22,075,000	2,400	1979 ..	70,400,000	2,040
1963 ..	23,502,800	2,413	1980 ..	79,063,000	1,946
1964 ..	24,670,000	2,408	1981 ..	82,400,000	1,852
1965 ..	26,715,000	2,339	1982 ..	70,150,000	1,540
1966 ..	27,540,000	2,376	1983 ..	65,600,000	1,319
1967 ..	27,169,000	1,929	1984 ..	60,000,000	1,158
1968 ..	23,846,000	1,899	1985 ..	51,100,000	915
1969 ..	24,664,000	1,808	1986 ..	48,408,000	806
1970 ..	27,742,660	1,802	1987 ..	46,802,000	732
1971 ..	28,442,000	1,731	1988 ..	44,294,000	712
1972 ..	30,640,000	1,676	1989 ..	43,115,000	699

Status of Appropriations

Status of fiscal year 1989 appropriations as of September 30, 1989:

Salaries and expenses:	
Total appropriations	$43,115,000
Reimbursements	285,291
Total obligations	43,258,705
Unobligated balance lapsing	141,586
Directed Rail Service:	
Unobligated balance available from prior appropriation	—0—
Total obligations:	
Payments to carriers	—0—
Recoveries of prior years obligations	—0—
Unobligated balance available (end of year)	—0—

Receipts

Status of receipt accounts as of September 30, 1989

Registration and filing fees	$5,342,035
Fines, penalties and forfeitures	143,132
Services charges for allotments of pay for savings account	—0—
Charges for administrative services	58,296
Recoveries from railroad loan guarantees	—0—
Miscellaneous recoveries and refunds	—0—
Withholding for military benefits	—0—
Total Receipts	$5,543,463

APPENDIX E

Carrier Financial and Statistical Data

Table 1.—Carriers regulated by the Commission

	Number
Carriers subject to Uniform System of Accounts and/or required to file annual & periodic reports as of Dec. 31, 1989:	
Railroads, class I[1]	18
Motor Carriers, class I passengers[2]	31
Motor Carriers, class I property[3]	886
Motor Carriers, class II property[4]	1,189
Holding companies (rail)	3
TOTAL	2,127
Carriers and organizations not filling reports as of Dec. 31, 1988:	
Railroads, class II[5]	23
Railroads, class III[6]	330
Railroads, Other	204
Carlines (companies that furnish cars used on rail lines)	166
Holding companies (motor)	74
Motor carriers of passengers, other than class I	3,597
Class I and II motor carriers of property relieved from reporting	280
Class III motor carriers of property	39,247
Water carriers	327
Freight forwarders	545
Rate bureaus and organizations	70
Coal slurry pipeline company	1
Protective services companies	6
TOTAL	44,870
GRAND TOTAL	46,997

[1] Railroad companies having adjusted annual operating revenues of $50,000,000 or more for three consecutive years. Revenues are adjusted annually to eliminate the effects of inflation from the classification process. Each railroad's gross annual operating revenue total is multiplied by a deflator factor based on Railroad Freight Index. For 1987, 1988, and 1989, the deflator factors are .5686, .5435 and .5348, respectively

[2] Motor Carriers having annual operating revenues in excess of $5,000,000.

[3] Motor Carriers having adjusted operating revenues in excess of $5,000,000 for three consecutive years. Revenues are adjusted annually to eliminate the effects of inflation from the classification process. Each motor carriers's gross annual operating revenues total is multiplied by a deflator factor based on the Producers Price index for all commodities. For 1987, 1988, and 1989, the deflator were .8735, .8400 and .8004, respectively.

[4] Motor carriers having adjusted annual operating revenues less than $5,000,000 but in excess of $1,000,000 for three consecutive years. Revenues are adjusted annually to eliminate the effects of inflation from the classification process. Each motor carrier's gross annual operating revenues total is multiplied by a deflator factor based on the Producers Price Index for all commodities. For 1987, 1988, 1989, the deflator factors were .8735, .8400 and .8004, respectively.

[5] Railroad companies having adjusted annual operating revenues less than $50,000,000 but in excess of $10,000,000 for three consecutive years. Revenues are adjusted annually to eliminate the effects of inflation from the classification process. Each railroad's gross annual operating revenues total is multiplied by a deflator factor based on Railroad Freight Index. For 1987, 1988 and 1989, the deflator factors are .5686, .5435 and .5348, respectively.

[6] Railroad companies having adjusted annual operating revenues less than $10,000,000 for three consecutive years. Revenues are adjusted annually to eliminate the effects of inflation from the classification process. Each railroad's gross annual operating revenues total is multiplied by a deflator factor based on Railroad Freight Index. For 1987, 1988 and 1989, the deflator factors are .5686, .5435 and .5348, respectively.

Table 2.—Class I line-haul railroads shareholders' equity, long-term debt and dividends (dollars in thousands)

Item	1986	1987	1988
1. Shareholders' equity			
a. Capital stock	$3,483,360	$3,024,635	$2,939,236
b. Capital surplus	6,258,979	6,094,608	6,528,872
c. Retained income	15,699,282	16,496,846	17,053,325
d. Total equity[1]	25,441,621	25,616,089	26,521,433
2. Long-term debt	10,183,266	8,703,420	8,673,422
3. Total equity and debt	35,624,887	34,319,509	35,194,855
4. Ratio of debt to total equity and debt (percent)	28.58	25.36	24.64
5. Amount of dividends			
a. Cash	$1,376,532	$1,252,293	$1,813,877

[1] Includes long-term debt due within one year.

Table 3.—Class I line-haul railroads, condensed income statement, financial ratios and employee data (dollars in thousands)

	Item	1986	1987	1988
1.	Number of carriers represented . . .	18	18	17
	CONDENSED INCOME STATEMENT			
2.	Opening revenues:			
	a. Freight	$25,343,911	$25,797,002	$27,154,961
	b. Passenger	107,717	93,559	84,677
	c. Total operating revenues	26,204,122	26,622,482	27,999,839
3.	Total operating expenses	24,896,015	23,878,116	24,889,015
4.	Net railway operating income	506,990	1,756,460	1,967,612
5.	Ordinary income	746,965	1,965,475	2,270,307
6.	Extraordinary items—Net[1]	−202,558	89,746	106,440
7.	Net income	544,407	2,055,21	2,376,747
	NET INVESTMENT AND EQUITY			
8.	Net investment in transportation property and equipment plus working capital[2]	35,657,291	35,768,874	36,761,080
9.	Shareholders' equity	25,441,621	25,616,089	26,521,433
	FINANCIAL RATIOS (PERCENT)			
10.	Operating ratio (L.3 ÷ L.2c)	95.01	89.69	88.89
11.	Return on net investment (L.4 ÷ L.8)	1.42	4.91	5.35
12.	Return on equity:			
	a. Ordinary income basis (L.5 ÷ 9)	2.94	7.67	8.56
	b. Net income basis (L.7 ÷ L.9)	2.14	8.02	8.96
	EMPLOYEE DATA			
13.	Average number	275,817	248,526	236,891
14.	Compensation:			
	a. Total	$9,918,673	$9,373,470	$9,306,857
	b. Per hour paid for	14.779	15.112	15.640

[1] Includes income taxes on extraordinary items and discontinued operations and accounting changes.

[2] Accumulated deferred income tax reserves have been subtracted from the net investment base in accordance with the modification approved by the Commission in Ex Parte No. 393 (Sub. No. 1), *Standards for Railroad Revenue Adequacy*, served December 31, 1986.

NOTE: Net railway operating income, ordinary income, and net income for the years 1986, 1987, 1988 were substantially reduced because of large accounting adjustments by some railroads to record severance pay for employee buyouts, the write-down of assets attributable to freight car retirements and line abandonments, and costs and claims expected to result from litigation and negotiated settlements.

Table 4.—Class I line-haul railroads' current assets and current liabilities as of December 31, 1987 and 1988 (dollars in thousands)

Item	1987 Amount	Percent of change	1988 Amount	Percent of change
Total current assets	$8,215,561	-10.0	+2.7	$8,440,128
Cash and temporary cash investments	2,327,382	-12.5	-23.4	1,783,010
Materials and supplies	866,257	-6.6	+4.6	927,262
Total current liabilities	8,181,480	-2.5	+5.8	8,657,310
Net working capital:				
Including materials and supplies	34,081	-95.4	-	-217,182
Excluding material and supplies	-832,170	-	-	1,144,444
Ratios:				
Current assets to current liabilities				
Including material and supplies	1.00		.97	
Excluding materials and supplies	.90		.87	
Cash and temporary cash investments to current liabilities	.28		.21	

Table 5.—Class I intercity motor carriers of property condensed income statement, financial ratios and employee data (dollars in thousands)

Item	1986	1987	1988
1. Number of carriers represented[2]	710	652	674
CONDENSED INCOME STATEMENT			
2. Opening revenues:			
a. Freight-intercity-common carrier	$30,053,755	$30,472,066	$32,490,305
b. Freight-intercity-contract carrier	2,590,353	3,047,656	3,914,241
c. Freight-local cartage	267,611	274,303	227,309
d. Intercity transportation for other motor carriers	197,091	166,150	194,881
e. Other operating revenue	3,093,244	3,170,008	2,997,620
f. Total operating revenue	36,202,054	37,130,183	39,824,356
3. Operating expenses	34,132,088	35,978,954	38,117,479
4. Lease of distinct operating unit—net	966	1,266	39
5. Net carrier operating income	2,070,932	1,152,495	1,706,916
6. Other income and miscellaneous deductions from income—net	−219,046	−253,918	−267,913
7. Income taxes on ordinary income[3]	807,439	364,979	375,166
8. Ordinary income	1,044,447	533,598	1,063,837
9. Extraordinary items—net[3]	25,886	36,896	−35,174
10. Net income	1,070,333	570,494	1,028,663
NET INVESTMENT AND EQUITY			
11. Net investment in carrier operating property and equipment plus working capital	9,254,949	9,557,900	10,937,750
12. Shareholders' and proprietors' equity	7,095,236	8,460,116	7,963,269
FINANCIAL RATIOS (PERCENT)			
13. Operating ratio (L.3 ÷ L.2)	94.28	96.90	95.71
14. Return on net investment (L.5 ÷ L.11)	22.38	12.06	15.61
15. Return on equity (l.10 ÷ L.12)	15.09	6.74	12.92
EMPLOYEE DATA			
16. Average number	502,538	537,956	560,332
17. Compensation	$13,438,121	$14,341,045	$15,399,887

[1] Carriers for which financial and statistical data were available.

[2] Does not include income taxes applicable to sole proprietorships, and corporations that have elected to be taxed under Sec. 1372(a) of the Internal Revenue Code. Also does not include taxes on extraordinary items. Includes provision for deferred taxes.

[3] Includes income taxes on extraordinary items and discontinued operations and accounting changes.

Table 6.—Class I intercity motor carriers of passengers condensed income statement, and financial ratios (dollars in thousands)

Item	1986	1987	1988
1. Number of carriers represented [1]	29	32	21
CONDENSED INCOME STATEMENT			
2. Operating revenues:			
a. Passenger intercity schedules	$764,504	$751,643	$825,149
b. Local and suburban schedules	3,703	5,631	9,784
c. Charter or special service ..	152,816	160,408	144,841
d. Other operating revenue	196,297	161,223	141,930
e. Total operating revenues	1,117,320	1,078,905	1,121,704
3. Operating expenses	1,082,074	1,080,573	1,059,068
4. Net carrier operating income ..	35,003	-1,668	62,636
5. Income tax on ordinary income [2]	13,928	-11,027	2,635
6. Ordinary income	36,475	-21,577	6,277
7. Extraordinary items—net [3]	-181	—	-6,477
8. Net income	36,294	-21,577	-200
EQUITY			
9. Shareholders' equity	483,993	150,630	117,163
FINANCIAL RATIOS (PERCENT)			
10. Operating ratio (L.3÷L.2e)	96.85	100.15	94.42
11. Return on equity (L.8÷L.9) ...	7.50	–	–

[1] Carriers for which financial and statistical Data were available.

[2] The large decline in the number of Class I bus companies between 1985 and 1986 is attributable primarily to a merger, effective January 1, 1986, of the wholly owned motor carrier of passengers subsidiaries of Trailways Lines, Inc. into Trailway Lines, Inc., pursuant to Commission approval in No. MC-F-16480, *Trailways Lines, Inc.—Merger—Trailway Bus System, Inc., et al.* served November 19, 1985.

[3] Does not include taxes applicable to sole proprietorships, partnerships, and corporations that have elected to be taxed under Sec. 1372(a) of the Internal Revenue Code. Also does not include taxes on extraordinary items. Includes provision for deferred taxes.

[4] Includes income taxes on extraordinary items and discontinued operations and accounting changes.

NOTE: The number of Class I intercity motor carriers of passengers decreased substantially in 1988 because, effective 1988, the classification limits for Class I bus companies were raised to $5 million—indexed for inflation—from the former $3 million.

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